CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 96

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, ET AL., PETITIONER,

vs.

UTAH CONSTRUCTION COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1928

CERTIORARI GRANTED APRIL 23, 1928

(33,304)

(33,304)

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF WYOMING

[File endorsement omitted]

No. 1547. At Law, Civil

UTAH CONSTRUCTION COMPANY, a Corporation, Plaintiff,

vs.

THE STATE HIGHWAY COMMISSION OF WYOMING, Consisting of Hyrum Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder, and Francis Johnstone, Defendant

WRIT OF ERROR AND CLERK'S RETURN—Filed Jan. 20, 1927

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable Judge of the District Court of the United States for the District of Wyoming, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Utah Construction Company, a corporation, plaintiff in error, and The State Highway Commission of Wyoming, defendant in error, a manifest error has happened to the damage of Utah Construction Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the same at St. Louis, in the State of Missouri, where said court is sitting, and file in the office of the

Clerk of said Court within sixty days from the date hereof, in said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further [fol. 2] to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States Supreme Court, this 20th day of January, A. D. 1927.

Issued at my office in Cheyenne, Wyoming, with the seal of the United States District Court, for the District of Wyoming, and dated as aforesaid.

Charles J. Ohnhaus, Clerk of the United States District Court for the District of Wyoming. (Seal U. S. Dist. Court, Dist. of Wyo.)

Allowed this 20 day of January, A. D. 1927.

T. Blake Kennedy, Judge of the United States District Court for the District of Wyoming.

UNITED STATES OF AMERICA,
District of Wyoming, ss:

In obedience to the Command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the United States District Court, for the District of Wyoming, at Cheyenne, in said District, this 12th day of March, A. D. 1927.

Charles J. Ohnhaus, Clerk of the United States District Court for the District of Wyoming. (Seal U. S. Dist. Court, Dist. of Wyo.)

[fol. 3] Citation, in usual form, showing service on Wm. O. Wilson and M. A. Kline, filed January 21, 1927, omitted in printing.

[fol. 4] IN UNITED STATES DISTRICT COURT

[File endorsement omitted]

[Title omitted]

SECOND AMENDED PETITION—Filed August 22, 1925

Comes now Utah Construction Company and by leave of court first had makes and files this its second amended petition; whereupon plaintiff alleges:

1. That during the times hereinafter mentioned plaintiff, Utah Construction Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Utah and was and is a citizen and resident of the State of Utah; and during such times was engaged in Wyoming in the business of constructing highways, in full compliance with the laws of Wyoming relating to foreign corporations doing business in such state.

2. That the said Hyram Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney are respectively the duly appointed, qualified and acting Highway Commissioners of *of* the State of Wyoming, and that collectively the said persons above named constitute the State Highway Commission of Wyoming with powers to sue and be sued under the provision of the statute of Wyoming in such case made and provided. That the said persons constituting the said State Highway Commission of Wyoming, and the said Commission is each a resident and citizen of the State of Wyoming.

3. That the matter and amount in controversy in this action, exclusive of interest and costs, exceeds the sum and value of three thousand dollars.

4. That the state highway engineer (hereinafter sometimes referred to as "the engineer") during the times here-[fol. 5] inafter mentioned was and is an appointee of the said State Highway Commission of Wyoming and of the state highway superintendent. That such engineer during the times hereinafter mentioned and for a long period prior thereto was authorized by such commission and superin-

tendent, through himself and district engineers and resident engineers acting in his behalf, to plan highways to be constructed under the authority of the said highway commission and to direct the construction thereof, to stake the location thereof and direct changes in the plans and method and means of construction of said highways. That substantially all of the work done in the field under the authority of said commission, in the way of surveying and constructing said highways, or superintending, overseeing and directing the construction thereof, was for many years prior to the making of the contract hereinafter named, and during all of such times as the construction work hereinafter mentioned was going on, performed (under the authority of said superintendent) by the said state highway engineer and by his assistant district and resident engineers.

5. That prior to June 1, 1922, the said state highway commission and the said superintendent caused to be surveyed through Goyne Drummond, a district superintendent, acting under the said state highway engineer, a certain proposed road and public highway extending along the course of Wind River in the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming, to be known as the Wind River Canyon Road. That in making such survey the said district engineer and his assistants staked upon the ground the location of the said proposed road with the usual engineering stakes; and made certain official plans, cross-section drawings and notes [—] were duly filed in the office of the said state highway commission at Cheyenne, Wyoming, were approved by said commission and superintendent, and became a part of the public records of that office. Such survey will be hereinafter referred to as the "Drummond survey" and the line staked and designated in said survey will be referred to as the "Drummond Line."

6. That thereupon and on or about the month of May, 1922, the said state highway commission gave public notice for proposals to construct the said road and highway according to said survey, and plaintiff on or about June 1, 1922, made its proposals in writing to the said state highway commission to construct according to the provisions of a certain form of contract and specifications, all the grad-[fol. 6] ing, including all excavation and embankment and

culvert construction of Section B of said proposed road, consisting of 1.95 miles, and Section C., consisting of 9.47 miles of the said road, and Section D., consisting of two miles thereof, and that said bid and proposals of plaintiff was accepted by the said state highway commission as the lowest responsible bid for the work; and that thereafter and on or about the 3rd day of June, 1922, plaintiff made and entered into said written contract with the said state highway commission, by which it was agreed between the parties thereto that plaintiff (therein referred to as "the contractor") should, at its own cost and expense, do all work and furnish all labor, materials and tools, except such as were mentioned in the specifications to be furnished by the State of Wyoming, necessary to construct to the satisfaction of the said state highway engineer such portions of the said Wind River Canyon road, as were covered by the said proposals of plaintiff, constituting in all 13.42 miles, extending from what was known as Boysen dam to a certain bridge in Thermopolis, Wyoming, said road to be constructed in compliance with specifications attached to said contract and the plans of the Drummond line (shown to plaintiff prior to the time of signing the said contract), and in compliance with the requirements of the said state highway engineer given thereunder.

The said contract further provided that in consideration of the covenants of plaintiff therein made and the completion of the said work embraced therein according to the plans, specifications and conditions of the contract, the State of Wyoming would pay and the contractor should receive as full compensation for everything done and furnished by the contractor under such contract, the price stipulated in the proposals of petitioner. That such prices so agreed to be paid consisted of the following:

In Section B, consisting of 1.95 miles, for all backfill in rock cuts, of an approximate quantity of 2210 cubic yards, 35c per cubic yard; for all station overhaul on road bed excavation, estimated at 300 cubic yards, 16c per cubic yard; for all excavation and embankment in constructing the said section of said highway, the amount thereof being approximately estimated at 58,300 cubic yards, at a flat or unclassified rate of $1.50 per cubic yard; for all station overhaul or backfill in rock cuts, approximately estimated

at 50,000 cubic yards, at the rate of 2c per cubic yard. In addition thereto a rate was agreed upon for furnishing and installation of certain necessary culvert pipe, masonry, construction of tunnels and concrete culvert pipe and walls. [fol. 7] In the construction of Section C, consisting of 9.47 miles, backfill in rock cuts, a-proximately estimated at 10,790 cubic yards, was to be made and performed at the rate of 35c per cubic yard; station overhaul on road bed excavation, approximately estimated at 400 cubic yards, was to be made and performed at 16c per cubic yard; at approximately 212,000 cubic yards of material, was to be done at an unclassified or flat rate of 68½c per cubic yard; all station overhaul and backfill in rock cuts in said Section C approximately estimated at 108,000 cubic yards, was to be done at the rate of 2c per cubic yard. In addition thereto the furnishing and installment of necessary masonry and concrete [and] walls and culvert pipes was to be done at a certain specified rate.

That said Section D, was agreed to be constructed at a certain unclassified or flat rate for excavation and embankment of 18c per cubic yard.

A true copy of said contract together with the specifications and proposals therein referred to, is hereto attached, marked Exhibit "A" and made a part hereof.

That the official plans and profiles of the said Drummond line are in the possession of defendant and not in the possession of plaintiff; that plaintiff has no complete copy of the said official plans and the defendant has refused and refuses, although demanded so to do, to either furnish a copy of the same to plaintiff or to permit plaintiff to inspect the original plans or take a copy thereof. Therefore a copy of the same cannot be attached hereto.

7. That the official plans of the said Drummond line, at the time of the making of said contract, contained and now contain certain projections or suggested changes which might be made in the alignment and grades of the highway at certain points shown thereon by means of appropriate engineering lines and drawings, which changes would require an increased amount of excavation; such changes applied to only a small portion of said line and were in general minor in character. All of such projected changes are

shown upon the official plans in defendant's possession. For the purpose of effecting said changes as shown by said projections and also for the purpose of providing increased tunnel work, plaintiff on or about December 12th, 1922, after plaintiff had been constructing part of said road for approximately four months, entered into a supplemental agreement with defendant by which it was agreed that the increased yardage thus required should be done at the flat rate described in the original contract. A true copy of [fol. 8] said supplemental agreement is herewith attached, marked Exhibit B and made a part hereof.

8. Plaintiff commenced the construction of said highway on or about July, 1922, and continued its construction thereof until the same was completed to the satisfaction of defendant and its said superintendent and engineer on or about July 4, 1924, when the same was accepted and approved by defendant and thrown open to the public as a public highway. In the construction of said highway plaintiff followed the lines, grades and measurements laid out by the said state engineer acting through his assistants in the field, and relied upon such grades, lines and measurements as laid out as being substantially correct and accurate representations of the work to be done under such plans and minor changes provided for in said supplemental agreement, and actually believed such grades, lines and measurements so laid out to be substantially in accordance with said plans and supplemental contract. But plaintiff alleges that said lines, grades and measurements as laid out by said engineer and followed by plaintiff, were not correct and accurate and did not substantially follow the original plans or lines, or the said minor changes contemplated by said supplementary agreement but were laid out and staked substantially according to an entirely new survey which was done at the direction of said engineer and superintendent and approved by the defendant.

Plaintiff is informed and believes and so states the fact to be that during the year 1922, at a month unknown to plaintiff the said state engineer caused the said new survey to be commenced, thereafter conducted by two assistants in his office named respectively Corwine and Olson, and that said survey was finally completed and that the

plans thereof were approved on or about February 1, 1923, during the time plaintiff was engaged in said construction work. That in making said new survey the stakes of the said Drummond line, laid out according to the said Drummond survey, were either destroyed or removed and new stakes bearing no distinctive marks were substituted therefor along the line of the new survey, which stakes were by plaintiff understood and believed to represent the said Drummond line as affected by said minor changes. On or about February, 1923, the exact date being unknown to plaintiff, new plans representing the survey of said Corwine and Olsen of the said highway, duly signed and approved by the said engineer and superintendent, were delivered to plaintiff by the said engineer as superseding [fol. 9] the original plans. Said new plans did not advise plaintiff on their face that they represented a substantial departure from the line of the original survey and were understood and believed by plaintiff to represent only such changes as were referred to in said supplemental contract.

The said line and grades so fixed and set by the said state engineer according to the said Corwine and Olson survey, as was well known to said state engineer and his assistants, differed from the original line and the minor alterations referred to in said supplemental agreement in this:

That whereas the said Drummond line had skirted the shore line of said Wind River, the Corwine and Oslin line was moved back from said shore line to the steep places and slopes bordering said river, and in many places into solid rock, requiring much more difficult and expensive operation in excavating and building the said highway. The character of the country was such that the moving of the line literally for a distance of a few feet would in many instances entirely change the character of the work, rendering it much more difficult. So that a short change in distance entirely changed the nature of the material to be handled. Such new line not only materially and substantially changed the character of the material to be excavated but change the entire scheme of construction in many places and altered the engineering features, so that plaintiff, in constructing such highway, was required to go to far greater expense, for which no additional compensation has been given or paid. Also, in many places the

line as fixed by the engineer under the new survey required the roadway to be constructed by means of excavation and cuts the slope whereof was so steep that the material forming the slides thereof could not remain in repose, as was well known to the defendant, or could by the exercise of reasonable diligence have been ascertained by defendant; wherefor plaintiff protested at constructing the slope so established but was required by the engineer to slope the same at such improper angle, and then was required by the engineer to re-slope the same, and in many instances was required to re-slope the same a number of times until, by experiment, the so-called "angle of repose" was ascertained. In general the new line fixed by the engineer and the stakes of the engineer placed thereunder was such that the extent and position of cuts in relation to the fills was greatly increased; so that plaintiff at greater expense was required to waste the materials for fills, and then borrow materials for fills, for which no compensation has been allowed. That the said line as set and fixed by the state engineer according to the new survey was such [fol. 10] as to require an increased yardage of material to be excavated over that allowed by the cross-sections or estimates of quantities thereof, by reason of the natural sloughing of material to a grade of repose back of the slopes cross-sectioned. That by reason of the said line as fixed by the engineer and the instructions of the engineer thereunder an amount of resurfacing with hand sorted material was required which was not required under the said contract or supplement thereto.

9. That in constructing the said new line as the same was fixed by the said engineer and staked by him, plaintiff performed the following amount of construction work which was not required to be done under the said Drummond plans and lines and the said supplemental agreement, and not covered by the rate of compensation provided therein, but was at an excessive cost for the same and which defendant has entirely failed and refused to compensate plaintiff for, which work is in addition to work of the character and kind required under the original contract and supplement thereto:

On Section B. Solid rock excavation in the amount of 21,608 cu. yds. of the reasonable cost and value of $2.10

per cu. yd. due to the natural sloughing of the material outside of the cross-sections, caused by improper staking, amounting to $45,376.80. Extra cost of construction due to changing from a borrow job under the Drummond line to an excess cut job under the Corwine and Olson line, as heretofore stated, consisting of 104,135 cu. yds. of excavation, at the reasonable cost and value, in excess of the rate of $1.50 per cu. yd. allowed under the original contract, of 60c per cu. yd., amounting to $62,481.00. Hand sorted rock surfacing of highway, under written instructions of the engineer, in the amount of 23,014 cu. yds. of the reasonable cost and value of $2.50 per cu. yd., amounting to $5,785.00.

On Section C., Extra embankment, or its equivalent increased cost of excavation, due to changing from a borrow job to an excess cut job, 104,925 cu. yds. of the reasonable cost and value of 68½c per cu. yd. amounting to $96,533.62. Extra embankment due to raising of grade upon order of the engineer, 9,987 cu. yds. at the reasonable cost and value of 68½c per cu. yd., amounting to $6,841.09. Extra excavation due to raising of grade by order of engineer 9,987 cu. yds. of the reasonable cost and value of 68½c per cu. yds. amounting to $6,841.09. Extra solid rock excavation, 112,784.9 cu. yds. of the reasonable cost and value of $1.65 per cu. yd. less the amount of 68½c per cu. yd. allowed by [fol. 11] the defendant therefor, amounting to $108,837.43. Hand picked rock surfacing, done under order of engineer, 13,602 cu. yds. the reasonable cost and value of $2.50 per cu. yd. less the sum of $4760.70 allowed by defendant as backfill, of the reasonable cost and value of $29,244.30. Experimenting in slopes by reason of improper staking on engineer's order, of the cost and value of $60,000.00. Extra excavation outside of cross-section stakes caused by improper staking of slopes, 49,801 cu. yds. of the reasonable cost and value of 68½c per cu. yd. amounting to $34,113.60. That a copy of the items of such extra work and labor due to the changing of said line as heretofore stated is hereto attached as Exhibit C and made a part of this petition.

10. That on or about Nov. 10, 1924, the said state engineer made and filed with said commission his final estimate of the amount of work done by plaintiff and the compensation plaintiff was to receive therefor, in which he found:

As to Section B of said highway that plaintiff had performed 2,314 cu. yds. of roadway excavation and embankment, backfill, at 35c per cu yd., amounting to $809.00; 1,316.4 cu. yds. of overhaul at the contract price of 16c per cu. yd., amounting to $210.62; had installed 98 lineal feet of 15-inch corrugated iron culvert at the contract price of $1.65 per ft., amounting to $161.70; had installed 174 lin. feet of 18-inch corrugated iron culvert at the contract price of $2.00 per lineal foot, amounting to $348.00; had installed 104 lineal feet of 36-inch corrugated iron culvert at the contract price of $3.75 per foot, amounting to $390; had constructed 337.15 cu. yds. of dry rubble masonry at the contract price of $4.50 per cu. yd., amounting to $1,517.18; had performed 104,134.7 cu. yds. of unclassified excavation at the contract price of $1.50 per cu. yd., amounting to $156,-202.05; had performed 891.6 lin. ft. of tunnel excavation at the contract price of $70.00 per ft., amounting to $62,412; had performed 60,304 cu. yds. station overhaul at the contract price of 2c per cu. yd., amounting to $1,206.08; had constructed 39.10 cu. yds. of cement rubble and walls at the contract price of $14.00 per cu. yd., amounting to $547.40; making a total estimate for said Section B, of $223,804.93.

As to said Section C. That plaintiff had performed 13,-602 cu. yds. of roadway excavation and embankment, backfill, at the contract price of 35c per cu. yd., amounting to $4,760.70; had installed 1678 lin. ft. of 15-inch corrugated iron culvert at the contract price of $1.65 per ft. amounting [fol. 12] to $2,768.70; had installed 308 lin. ft. of 18-inch corrugated iron culvert at the contract price of $2.00 per foot, amounting to $616.00; had installed 736 ft. 24-inch corrugated iron culvert at the contract price of $2.70 per foot, amounting to $1,987.20; had installed 626 lin. ft. of 36-inch corrugated iron culvert at the contract price of $3.60 per foot amounting to $2,253.60; had constructed 944.2 cu. yds. of dry rubble masonry at the contract price of $2.00 per cu. yd., amounting to $1,888.40; had constru-ed 1.52 cu. yds. of Class B concrete end walls at the contract price of $25.00 per cu. yd. amounting to $38; had performed 383,315 cu. yds. of unclassified excavation at the contract price of 68½c per cu. yd. amounting to $262,570.78; had performed 26,137 cu. yds of station overhaul on item 1, at

the contract price of 2c per cu. yd., amounting to $522.74; had constructed 386.25 cu. yds. of cement rubble end walls at the contract price of $14.00 per cu. yd., amounting to $5,407.50; making a total amount of $282,813.62.

As to Section D. That plaintiff had performed 52 cu. yds. of excavation for structure at the contract price of $1.25 per cu. yd., amounting to $65.00; had constructed 39 cu. yds. of Class A concrete work at the contract price of $25.00 per cu. yd. amounting to $975.00; had installed 200 lin. ft. of 15-inch corrugated iron culvert. at the contract price of $1.65 per foot, amounting to $330.00; had installed 40 lin. ft. of 18-inch corrugated iron culvert at the contract price of $1.90 per [per] ft., amounting to $76; had installed 70 lin. ft. of 36-inch corrugated iron culvert at the contract price of $3.60 per ft., amounting to $252; had installed 4,399 pounds of deformed steel bars at the contract price of 7c per pound, amounting to $307.93; had constructed 19.9 cu. yds. of Class B concrete end walls at the contract price of $25.00 per cu. yd., amounting to $497.50; had performed 15,730 cu. yds. of unclassified excavation at the contract price of 18c, amounting to $2,831.40; making a total amount of $5,334.83.

11. That plaintiff performed all of said construction work for the defendant as set out and contained in said final estimates of the state engineer; that said estimate was accepted by the defendant and approved by it as its offer of payment to plaintiff for the work done in the construction of said highway. But that in addition to the amount of work and construction and the value thereof as contained in said engineer's estimate, plaintiff performed the extra work and at the excessive costs and value as set out in paragraph 9 [fol. 13] of this petition; but the said state engineer and the defendant have refused since said final estimate was made on November 10, 1924, and still refuse, although demanded so to do, to pay any additional sums than that contained in said engineer's final estimate.

12. That by reason of the facts hereinbefore set out plaintiff has been damaged in the sum of $456,053.93, with interest at the rate of 7% per annum from November 10, 1924, until paid.

And for a second cause of action and for a second and further breach of said contract, plaintiff alleges:

1. That plaintiff incorporates by reference the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 (incl.) of the first cause of action, and makes said paragraphs a part of the said second cause of action.

2. That plaintiff performed each and every covenant and condition on its part to be performed under the said contract; but that of the amount of $511,953.38 so found to be due by the said engineer and the defendant, the defendant had paid only the sum of $423,179.57, leaving a balance due and unpaid to plaintiff of $88,773.81. Defendant, although demanded so to do, has refused and failed to pay the said $88,773.81, since November 10, 1924, when it became due, unless plaintiff would execute and deliver to defendant a written release and waiver of all damages and claims for extra compensation as set out in the first cause of action herein, which plaintiff has refused and refuses to do.

Wherefore, plaintiff demands judgment under its first cause of action for the sum of $456,053.93 with interest thereon at the rate of 7% per annum from November 10, 1924, until date of judgment; and under its second cause of action for the sum of $88,773.81, with interest thereon at the rate of 7% per annum from November 10, 1924, until date of judgment, and for plaintiff's costs.

Marshall, Macmillan & Crow, Continental Bank Building, Salt Lake City, Utah, W. L. Walls, Hynds Building, Cheyenne, Wyoming, Attorneys for Plaintiff.

[fol. 14] *Duly sworn to by William L. Walls. Jurat omitted in printing.*

EXHIBIT A TO AMENDED PETITION

Fed. No. —. State No. —.

State of Wyoming, Highway Department

Specifications, Proposal, and Contract of (Contractor:) —— ——, (Home Address:) —— ——, on (Road or Structure:) ——,——, —— County, Wyo.

Length: — Miles

Definition of Terms

In interpreting these specifications, the following definitions shall prevail:

1. Commission.—The term "Commission," as herein employed, shall be held to mean the State Highway Commission of Wyoming, or its duly authorized representative.

2. Engineer.—The State Highway Engineer of Wyoming, acting directly or through his duly authorized assistants, such assistants acting within the scope of the particular duties entrusted to them.

[fol. 15] 3. Inspector.—An authorized assistant of the Engineer, assigned to inspect any feature of the materials or workmanship entering into the improvement.

4. Contractor.—The person, partnership, or corporation, constituting one of the principals to the contract, of which these specifications form a part, and undertaking to perform the work herein specified, or any lawful agent of such person, partnership or corporation.

5. Plans.—The official plans, profiles, cross sections, and other drawings and details of the work to be done, and which are to be considered in the contract as coordinate with these specifications.

6. Contract.—The agreement between the contractor and the State Highway Commission covering the work to be performed and including the plans and specifications.

7. Specifications.—The directions, provisions and requirements contained herein, together with all written agree-

ments made or to be made, pertaining to the method and manner of performing the work or to the quantities and qualities of materials to be furnished under the contract.

Instructions to Bidders

Interpretation of Approximate Estimate.—Bidders are cautioned that the estimate of quantities attached hereto will serve, so far as this contract is concerned, only for the purpose of comparing bids. The basis of payment will be actual quantities of work performed, and if, upon the completion of the project, the actual quantities should show either increase or decrease from the quantities shown in the approximate estimate the unit prices mentioned in the proposal will still prevail.

Examinations of Plans, Specifications, and Site.—Bidders are required to examine the site of the proposed work, as well as the plans and specifications, for the improvement, and professions of ignorance regarding the requirements of the work will in no way serve to modify the provisions of the contract.

Laws Affecting Public Work.—The attention of bidders is called to the necessity of being familiar with the various Federal, State and local laws, affecting the length of working days, employers' liabilities, Sunday work, etc.

[fol. 16] Proposal Forms.—In filling out proposal forms bidders shall be governed by the following provisions: (1) Proposals must be made on the blank form provided herewith. The blank spaces in the proposal form, except as otherwise noted, must be filled in, and no change shall be made either in the phraseology of, or in the items mentioned in, the proposal form.

(2) Proposals must be signed in ink by the bidder with the signature in full. When a firm is a bidder, the agent who signs the firm name to the proposal shall state, in addition, the names and addresses of the individuals composing the firm. When a corporation is a bidder, the person signing shall state under the laws of what state the corporation was chartered and the name and title of the officer having authority under the by-laws to sign contracts. The pro-

posal shall also bear the seal of the corporation, attested by its secretary. Any one signing the proposal as agent must file with it legal evidence of his authority to do so. Post office address, county and state must be given after the signature.

(3) Proposals that contain any omission, erasure, alteration, addition, or item not called for in the engineer's estimate, or that show irregularities of any kind, will be rejected as informal.

(4) Each proposal shall specify a unit price, written with ink in both words and figures, for each of the separate items as called for, and shall also show the products of the respective unit prices and quantities of work, written in figures with ink, in the column provided for that purpose. The gross bid, or sum of the various products, shall be shown, written in ink on the line provided for such gross bid.

(5) Any proposal which does not contain prices set opposite each of the several items for which there is an estimated quantity in the engineer's estimate, or any proposal which shall in any manner fail to conform to the conditions of the published notice inviting proposals, may be deemed informal and rejected.

(6) Each proposal must be accompanied by a money deposit equal to two (2) per centum of the amount of the proposal, in the form of cash, a draft, or a certified check, issued by a bank, in good credit and payable at sight to the State Highway Commission of Wyoming.

(7) Proposals will be placed in a sealed envelope so marked as to indicate its contents without being opened. [fol. 17] This envelope shall then be placed in another addressed as indicated in the notice to contractors. Proposals may be delivered either in person or by mail.

(8) If a bidder wishes to withdraw his proposal, he may do so, without prejudice to himself, provided that a written request is filed at the address indicated above not later than the day before the bids are to be opened.

(9) Proposals will be publicly opened at the time and place mentioned in the notice to contractors, and bidders

are invited to be present at the opening. Proposals received after the date set for the opening will be returned to the bidder unopened.

Disqualification of Bidders—The following causes will be considered sufficient to disqualify any bidder and no proposals from disqualified bidders will be considered.

(1) Interest by the same persons in more than one proposal.

(2) Collusion among or between bidders.

(3) Unbalanced proposals; that is, proposals in which the prices bid for some items are out of all proportion to those bid for others.

(4) Lack of responsibility on the part of bidders.

(5) Lack of experience or capital on the part of bidders. Evidence of experience, ability, and financial standing, as well as a statement regarding plant and machinery available may be required of any or all bidders.

Award and Execution of Contract

Right to Reject Bids—After the proposals are opened and read, the bid prices will be compared by the State Highway Engineer, and the results of such comparisons will be immediately made public.

Award of Contract—The award of the contract, if it is awarded, will be to the lowest responsible bidder whose proposal shall comply with all requirements necessary to render it formal. For the purpose of award the summation of the products of the approximate quantities, herein stated, by the unit prices will be considered the amount of the bid. In no case will an award be made until all necessary investigations are made into the responsibility of the low bidders.

[fol. 18] Return of Proposal Guaranty.—As soon as the bid prices have been compared, the engineer may, at his discretion, return the guaranty deposits accompanying such proposals, as in his judgment would not likely be considered in making the award. All other proposals guaranties will

be held until the contract and bond have been executed, after which they will be returned to the respective bidders whose proposals they accompany.

Contract Bond Required.—The bidder on grading and surfacing work to whom the contract is awarded will be required to furnish bond equal to fifty per cent of the total amount of the contract price. The bidder on concrete and steel structures to whom the contract is awarded will be required to furnish bond equal to 100 per cent of the total amount of the contract price. The bond shall be furnished by a reputable bonding company, and shall be satisfactory to the State Highway Commission and on the form provided herewith.

Execution of the Contract.—The contract shall be signed by the contractor and satisfactory bond furnished within ten days after he has received notice of award. The place at which the contract must be signed and attested shall be specified in the notice of award. In case of failure on the part of the contractor, to enter into contract and furnish bond as above required, the guaranty accompanying his proposal will become forfeited and become a donation to the State Highway Fund. Award may then be made to the next lowest bidder, or the work be re-advertised, as the State Highway Commission may decide.

Sub-letting or Assigning Contracts—All awards will be made with the understanding that the work awarded will be performed by the contractor to whom the award is made, with the assistance of workmen under his immediate superintendence, and the contract shall not be sub-let to another contractor except with the written consent of the State Highway Engineer.

The Use of Patented Processes, etc.—The basis on which a contract will be awarded will be the bid prices, and these shall include all charges for the use of patented processes, materials or methods, and for all other similar incidental charges not expressly provided for in the specifications.

General Provisions

Scope of Work to be Done—The contractor will be required under these specifications to perform the following work:

[fol. 19] 1. To grade the subgrade and shoulders, construct the base course and surface and bring the same to the lines, grades and tupical cross section shown on the approved plans and to do the work in accordance with the plans and specifications.

2. To do all clearing and grubbing, ditching, grading, shaping and surfacing; to make all excavations and embankments; to construct all paving masonry, and stone work, to build all waterways, drains, ditches, and culverts; and to clear away all rubbish which may obstruct the roadway, ditches or waterways, whether such obstructions result from his operations or otherwise. In short, the contractor will be required to furnish all materials, implements and labor necessary to build and put in perfect condition for use, the entire roadway with all appertaining structures, and shall leave the roadway and adjoining property in neat condition and free from rubbish or other waste materials.

3. To start the im-rovement at the part of the road designated by the Engineer, and to conduct and complete the work in accordance with the plans and specifications as interpreted by the Engineer. The unit prices mentioned in the proposal shall cover the cost of all materials and labor.

Permits and Licenses.—Such permits, licenses, insurance policies, etc., as may be necessary in order to comply with state or local laws in conducting the work, shall be provided by the contractor at his own expense.

Interpretation of Plans and Specifications.—The contractor shall not deviate from the plans and specifications in any particular without the written authority of the engineer. In case of discrepancies between the plans and specifications, the plans are to take precedence, and in case of discrepancies between figured dimensions and scale, on the plans, the figures are to govern. In case special provisions or work, not covered in the plans or standard specifications are to be required, the clauses covering the requirements for such special provisions or work and attached to the proposal form, shall take precedence over any other requirements contained in the plans or standard specifications with which such clauses may conflict.

Alterations.—The State Highway Engineer shall possess the right to make reasonable changes in the plans or character of the work, when in his judgment these may be desirable, but such changes shall not serve to increase the cost of the work to the contractor unless he receives suit-[fol. 20] able compensation therefor. All orders regarding changes in the plans or specifications must be in writing and signed by the State Highway Engineer. After the work is performed no claims for extra allowances, on account of alterations in the plans or specifications will be considered unlses supported by a written supplementary order as provided above.

Additional Work.—The State Highway Engineer shall possess the right to increase the amount of work to be done, within the limits of the plans, without other formality than a written order. Such added work will be paid for at the contract unit prices, where these apply or in the absence of contract unit prices, covering the kind of work ordered, payment will be made on the following Force Account basis. (1) The contractor shall furnish all materials required on account of the extra work, at their actual cost to him. (2) He shall furnish all necessary labor at actual cost plus 10 per cent to cover the cost of supervision and the rental of small tools and ordinary equipment. (3) In case special equipment or machinery is required in order to perform the extra work economically, the State Highway Engineer may order the use of such equipment and machinery, and payment for same will be made on rental basis at the rate agreed upon in writing between the engineer and contractor.

Unauthorized Work.—No payment will be made for work not required on the plans or authorized in writing by the State Highway Engineer.

Progress of the Work.—The contractor shall begin work promptly after the contract has been executed and shall so prosecute the work that the progress made will be approximately proportional to the amount of time elapsed after the date of the contract. Failure to comply with this requirement may result in the annulment of the contract as hereinafter provided.

Limitation of Operations.—The contractor shall so limit his operations as not to have any unduly large section of the road under construction at the same time, and shall keep all of his activities segregated within as small compass as practicable.

Character of Workmen and Equipment.—All equipment and workmen provided by the contractor shall be the best available for the kind of work performed. Any person employed by the contractor, whom the engineer may deem incompetent or unfit *for* perform the work, shall upon the written instructions of the engineer, be discharged, and [fol. 21] such person shall not be again employed on the work. Failure by the contractor to provide adequate equipment may result in annulment of the contract as hereinafter provided.

Co-operation of Contractor Required.—The contractor shall keep copies of the plans and specification on the work at all times. He shall also remain on the work or provide anauthorized representative to receive and carry out instruction of the engineer. He shall provide all reasonable facilities to enable the engineer or inspectors to inspect the workmanship and materials entering into the work, and shall cooperate in the matter of setting and preserving stakes, bench marks, etc., for controlling the work.

Laws to be Observed.—In prosecuting the work, the contractor shall exercise care to see that all laws are observed, both by himself and his employes. He shall also observe the rules of the Boards of Health and shall take reasonable steps to insure proper sanitation in connection with all of his activities.

Public Convenience and Safety.—In conducting the work the contractor shall interfere as little as possible with public traffic over the road. He shall establish barricades, danger warnings and detour signs wherever these would add the safety or convenience of the public. He shall exercise especial precautions in the storage and use of explosives to warn away the public as well as to safeguard his employes.

Preservation of Property.—The contractor shall preserve from damage all property along the lines of the work, the removal or destruction of which is not called for by the

plans. This applies to public utilities, trees, monuments, fences, etc. and wherever such property is accidentally damaged due to the activities of the contractor, it shall be immediately restored to its original condition.

Responsibility in Case of Damage to Persons or Property.—The responsibility for all damage to persons or property arising out or on account of work done under this contract, shall rest upon the contractor, and he shall save the State of Wyoming harmless from all claims made on account of such damage.

Responsibility for Damage to Work.—Any damage to the work before it is finally accepted, whether such damage is due to ordinary or extraordinary causes shall be repaired by the contractor; except that where a section or portion of road is opened to public traffic, with the approval of the [fol. 22] engineer, before final acceptance, the contractor will not be expected — make good the ordinary wear due to traffic, provided that no inherent defects in the work are disclosed. But this exception will not serve to release the contractor from responsibility for damage caused by storms, or otherwise, except as noted, to sections of road that have been opened to traffic.

While the improvement is under way the engineer may, in case of urgent necessity, and under a supplementary agreement with the contractor, issue permits for ditches or other openings to be made across or along the road by others than the contractor. In case of damage to the road on account of work done under such permits, the contractor shall correct the damage and collect payment therefor on a force account basis, from the party or parties to whom the permits were issued. Failure on the part of the contractor to correct damage of this kind, and collect payment as prescribed, before the parties responsible for the damage have completed their operations, may result in making the contractor liable for the necessary repairs at his own expense.

Testing Materials.—The engineer may require samples of any or all materials used in the work to be tested in the laboratories of the U. S. Office of Public Roads and Rural Engineering or in the laboratories of the University of Wyoming or other laboratories designated as satisfactory

by the State Highway Engineer. The contractor shall afford such facilities as the engineer may require for collecting and for warding these samples, and shall hold the materials represented by the samples until tests have been made and the materials found equal to the requirements of the specifications or to approved samples. However, no more time will be required for making the tests than is customary for laboratory tests of the kind involved, with a reasonable allowance for transportation of samples, unavoidable delay in beginning the tests, and the return by mail of the laboratory reports. The contractor in all cases shall furnish the required samples without charge.

Materials may be rejected by the engineer, whenever, in his judgment, they fail to meet the requirements of the specifications, and when rejected they shall be immediately removed from the work and disposed of as hereinafter specified.

Storage of Materials.—All materials intended for use in the work shall be so stored as to prevent damage from exposure to the elements, admixture of foreign materials or from any other cause. The engineer will refue to accept, [fol. 23] or sample for testing, any materials that are improperly stored.

Use of Materials Found on Work.—In the absence of special provisions to the contrary, any stone, gravel, sand, etc. that may occur in excavations opened in grading the road, any timber that would necessarily be removed in making the improvement, or any existing structures that are to be replaced, may be used by the contractor, provided, and to the extent, that these materials are suitable for and required in the work. Materials so used and paid for in some other form than excavation or clearing, as the case may be, will not be paid for as excavation or clearing. Materials found on the work, especially timber and existing structures, and necessarily removed, but not used by the contractor as provided above, shall be put into shape to be handled ecoonmically and neatly piled along the right-of-way as the engineer may direct.

Lines, Grades, and Measurements.—The engineer will furnish all lines, grades and measurements necessary in

laying out the work or in determining the quantities of work performed. Such stakes and markings as the engineer may set for either his own or the contractor's guidance shall be scruplously preserved by the contractor. In case of negligence on the part of the contractor or his employees resulting the destruction of such stakes or markings, an amount equal to the cost of replacing same will be deducted from subsequent estimates due the contractor.

Crown or Cross-section of Roadway.—The typical cross section contained in the plans shall be implicity followed as regards the crown or cross section of the roadway, except that where considerations of drainage or other special conditions make it necessary or desirable to change the shape of the surface, or to otherwise alter the shape of the cross section, the engineer may fix this feature of the work to fit the conditions.

Authority and Duties of Inspectors.—The engineer may appoint inspectors to inspect all materials used and all work done. Such inspection may extend to all or any part of the work and to the preparation or manufacture of the materials to be used. The inspectors will not be authorized to revoke, alter, enlarge, or relax the provisions of these specifications, nor to delay the fulfillment of the contract by failure to inspect materials and work with reasonable promptness. An inspector is placed on the work to keep the engineer informed as to the progress of the work and the manner in which it is being done; also to call the at-[fol. 24] tention of the contractor to any infringements upon plans or specifications. He will not be authorized to approve or accept any portion of the work or issue instructions contrary to the plans and specifications. The inspector will have authority to reject defective material and to suspend any work that is being improperly done, subject to the final decision of the engineer.

The inspector will exercise such additional authority only as may from time to time be delegated to him by the engineer.

Inspection of Materials and Work.—The engineer and his inspectors shall have free access to all parts of the work and to all materials intended for use in the work as well as to the factories where such materials are manufac-

tured. Materials will be inspected and passed upon as promptly as practicable after they are delivered on the work, and none shall be used in the work until after approval. The work will be inspected as it progresses, but failure to reject or condemn defective work at the time it is done will in no way prevent its rejection whenever it is discovered before the road is finally accepted and approved.

Defective materials or work shall be removed and disposed of immediately after they are rejected. The disposition to be made of defective materials shall in all cases be such that the engineer can always satisfy himself that each lot or parcel of such material has been disposed of as claimed by the contractor.

Upon the failure of the contractor to remove and properly dispose of rejected material or work immediately after receiving formal notice, the engineer may employ labor and remove such material or work, and charge the cost of same to the contractor.

Final Cleaning Up.—When the work is completed the right-of-way borrow pits and all ground occupied by the contractor in connection with the work shall be cleared of all rubbish, excess materials, temporary structures and equipment, and all parts of the work as shall be left in a neat and presentable condition.

Suspension of Work.—The engineer shall have authority to suspend the work on account of (1) default of the contractor; (2) unfavorable weather conditions, and (3) any other condition which, in the judgment of the engineer, makes it impracticable to secure first-class results. The [fol. 25] contractor shall immediately respect the written order of the engineer to suspend operations wholly or on any particular section of the road.

Time of Completion.—In computing the time allowance for completing the work the engineer will allow an additional number of working days, over and above the time allowance mentioned in the proposal, equal to the number of working days lost by the contractor after starting the work, because of conditions which the engineer considers such as to prevent proper work and during which days work was actually suspended or materially impeded. The basis

for computing any extra time allowance will be the condition record kept by the engineer or his assistants.

Should the contractor fail to complete the work within the time allowance mentioned in the proposal, subject to the above modification, the engineer will thereafter deduct from any moneys due or coming due to the contractor, as determined by the engineer's estimates, an amount equal to the cost of maintaining the necessary force of engineers and inspectors on the work during the additional time, and this amount shall be considered as reasonable liquidated damages due the State of Wyoming by the contractor for his failure to have finished the work in the specified time limits.

Failure to Perform Contract.—The State Highway Commission, whenever any of the following conditions exist, may enter upon the performance of the terms of the contract, of which these specifications form a part, i. e.—

If the contractor fails to begin the work under contract within the time specified, or fails to perform the work with sufficient workmen and equipment or with sufficient material to insure the prompt completion of said work, or shall perform the work unsuitably or shall neglect or refuse to remove materials or perform any such work as shall be rejected as defective and unsuitable, or shall discontinue the prosecution of the work; or if the contractor shall become insolvent or declared bankrupt, or commit any act of bankruptcy or insolvency, or allow any final judgment to stand against him unsatisfied for a period of forty-eight (48) hours, or shall make an assignment for the benefit of creditors, or from any other cause whatsoever shall not carry on the work in an acceptable manner.

Before such entry is made, the contractor and his surety will be first notified in writing by the State Highway Engineer of the conditions which make such entry imminent. [fol. 26] Ten(10) days after such notice is given, if no effective effort has been made by the contractor or his surety to correct the condition complained of, the Commission may enter for the purpose of performing the terms of said contract.

Upon receipt of a notice from the Commission that the contract has not been fulfilled and that the State of Wyoming will enter for the purpose of doing the work

necessary to complete the said contract, the contractor and all those acting under him, shall immediately discontinue all operations. The Commission, without violating the contract, may then proceed with the work in any lawful manner that it may elect until the work is finally completed, and the terms and conditions of the contract are completely performed, and may appropriate or use any or all materials and equipment on the ground as may be suitable and acceptable. The total cost of the work under contract will then be computed. If this total cost is less than the contract price, the contractor shall be entitled to receive the difference; if the total cost is greater than the contract price, the excess shall be made up and paid to the State Highway Commission by either the contractor or his sureties.

Upon the State Highway Commission entering upon the completion of said contract, it may, if it so elect, pay for such material and labor which has entered into such construction prior to the taking over of the same by the State Highway Commission hereunder, which has not been paid for by the contractor or anyone in his behalf; such costs or charges shall be deducted from any moneys due or which may become due said contractor.

Measurement of Quantities.—The determination of the quantities of work performed will be by the engineer and based on measurements taken by him or his assistants. In computing volumes the method of average and areas will be used for excavation and embankments, and the prismoidal formula for masonry. Other quantities will be computed in the units used in the proposal form, according to well recognized engineering prinicples, and no local rules or customs will be considered.

Payments.—Payment for each kind of work will be made on the basis specified for that particular item, and at the rate mentioned in the proposal. The amount computed on this basis and rate shall be payment in full for the work done including all claims of every character. No payments, however, shall constitute an acceptance of the work. [fol. 27] Partial payments will be made monthly, provided that the work is progressing to the satisfaction of the engineer. The total amount of such payments at any time

before completion shall not exceed 85 per centum of the value of the work done, as estimated by the engineer.

Whenever the total amount of work provided for by the contract shall have been completely performed on the part of the contractor, and all parts of the work have been approved by the engineer, a final estimate showing the value of the work will be prepared by the engineer as soon as the necessary measurements can be made. The amount of this estimate, less any sums that may have been deducted in accordance with the provisions of the contract, will be paid to the contractor within ninety (90) days after notice of completion is furnished by the contractor.

No Waivee of Legal Rights.—The State of Wyoming reserves the right, should an error be discovered in the estimate, or conclusive proofs of dishonesty, on the part of the contractor, discovered in the work, after the final payment has been made, to claim and recover by process of law, such sums as may be sufficient to correct the error or make good the defects in the work resulting from the contractor's dishonesty.

Maintenance.—Until the time of final approval of the work by the engineer, the contractor shall keep the finished roadway, shoulders, side slopes, ditches and drains in repair and free from obstructions and shall make good any defects in the work which may result from settlement, or otherwise. An exception to this requirement is in the case of sections or portions of roadway opened to traffic before final approval. The extent of this exception has already been defined in these specifications.

Construction Details

Excavation and Embankment.—Under this heading shall be included all clearing and grubbing, excavating, filling, borrowing, trimming, picking down, shaping, sloping, and all other work that may be necessary in preparing and grading the roadbed called for in the plans, as well as the excavation for all necessary drainage and outlet ditches, and the foundation pits for structures, and the grading of proper connections with all intersecting highways.

Clearing and Grubbing.—That portion of the right-of-way lying inside the limits of the roadbed and slopes, and such other portions of the right-of-way as the engineer may [fol. 28] require, shall be cleared and grubbed to conform with the following requirements:

The right-of-way must be cleared to the width of twenty (20) feet on each side of the center line and such additional width as may be designated by the engineer; and from the entire space required for the roadbed and necessary slopes, side drains and borrow pits there shall be cut off or grubbed up all trees, brush, stumps and other vegetable matter, which together with logs, brushwood, etc., of every description, shall be burned or removed from the grounds, as the engineer may direct, and in such a manner as not to injure the adjoining lands or obstruct the line of fences along the said right-of-way. When the embankment exceeds two feet in height it will only be required to cut the trees, stumps, and brush close to the ground; but when less than two feet in height the trees, stumps, brush and other vegetable matter found within the slope stakes must be grubbed up and removed beyond the limits of the embankment.

Removal of Structures.—Where the contractor is required to remove from the right-of-way buildings, fences, telephone poles, or other structures not constituting a part of the roadway, and the removal of which is not elsewhere in these specifications provided for, such work will be considered as extra or force account work, and shall be done according to the engineer's instructions, and paid for as provided under the clause covering additional work.

In case that structures constituting a part of the roadway, such as existing culverts or bridges, are required to be torn out and removed, such work will be considered as incidental to the structure which replaced the one removed, and will not be paid for except as excavation for structures.

Roadway Excavation.—The materials to be excavated from the roadway will be indicated on the plans, and by means of the engineer's stakes. In excavating such materials, the contractor shall observe the following precautions:

1. The work shall be so conducted that the bottom on the excavation will at all times be well drained.

2. The material excavated shall be unclassified.

3. In case solid rock is being excavated, the depth of the excavation shall be increased six (6) inches over and above the depth shown on the profile or indicated by the engineer's stakes and shall be backfilled with stone, gravel, or other material as shall pass a 1½ inch ring as directed.

[fol. 29] 4. All slopes, except in solid rock, shall be trimmed accurately to the slopes shown on the cross section drawings, and care shall be exercised that no material shall be loosed below the required slopes.

5. Roadway excavation shall include the removal of any muck, quick-sand, soft clay, or spongy material that, in the engineer's judgment, would not compact readily and form an unyielding roadbed. The contractor shall remove and replace materials of these kinds wherever the engineer may direct, without regard to the fact that such work may not be called for on the plans. Excavation of this kind will in all cases be classed as common excavation and paid for as such.

Excavations for Structures.—Foundation pits for culverts, bridges, and other structures shall be excavated to the depths and lines indicated on the plans or established by the engineer. The material obtained from such excavation shall be used, as the engineer may require, either in constructing embankments or for backfilling over and around the structures after they are complete, or in case it is unsuitable for either of these purposes, it shall be disposed or in such manner as not to obstruct the stream or otherwise impair the efficiency or appearance of the structure or other parts of the road.

The backfilling or openings made for structures shall be considered as a necessary part of the excavation though the engineer may require that the material for use in making the backfill be obtained from a source entirely apart from the structure. In all cases the backfill shall be made in layers not more than 6 inches thick, and each layer shall be thoroughly tampered or rammed before the next succeeding layer is spread. In cases where the material used in making the backfill is difficult to compact so as to prevent

subsequent settlement, the engineer may require each layer to be thoroughly flushed with water, if in his judgment such flushing would be desirable.

Embankments.—The materials excavated from the roadway in accordance with the foregoing requirements, or from borrow pits, as provided below, when of a quality satisfactory to the engineer, shall be used in constructing the embankments called for on the plans. In constructing embankments, the contractor shall observe the following rules:

1. Embankments shall contain no muck, quicksand, vegetable matter, or other material which would not compact to form a stable and enduring roadbed.

[fol. 30] 2. Where the depth of an embankment is to be less than 2½ feet, the area to be covered shall be plowed and all sod and vegetable matter removed before the embankment is started.

3. Embankments shall be formed in horizontal layers not more than one (1) foot thick, and shall be compacted by distributing the necessary hauling uniformly over each succeeding layer. Each layer shall be carried across full width and length, and where rock is being used it shall be carefully distributed so that the interstices between the larger particles are filled with earth or finer particles to form a dense compact mass. The top six (6) inches of any embankment shall not contain any stones larger than would pass through a three (3) inch ring.

4. In constructing embankments due allowance shall be made for shrinkage and settlement. That is the embankment shall be made slightly wider and deeper than called for on the plans, in order that after shrinkage and settlement are complete, the embankment may have the required cross section at all points. The engineer will co-operate in determining the necessary amounts of such allowance, but all embankments shall have the proper height, width and shape when finally accepted by the engineer.

5. Where the use of a roller is to be required in constructing embankments, the kind and weight of the roller

and the extent to which it is to be used will be specified in the special clauses accompanying the proposal form.

Disposal of Surplus Materials.—All surplus excavation and waste material shall be used uniformly to widen embankments, or flatten side slopes, or deposited in such other places and for such purposes as the engineer may direct.

Borrow Excavation.—If, after the roadway excavation intended for certain corresponding embankments is complete, additional material is required in order to complete the embankments, the contractor shall obtain the necessary additional material, either by uniformly widening the roadway excavation, within or without the free haul limits, or by excavating from borrow pits, as decided by the engineer.

Borrow pits shall not be opened by the contractor until their location has been approved and cross sectioned by the engineer. The excavation shall be made, in accordance with some reasonable design, so that when the operations of the contractor are complete, the pit will present a neat [fol. 31] appearance, drain itself where practiable, and be of a shape easily cross sectioned.

Special Borrows.—In unsettled districts when approved by the engineer and by the property owners affected, the contractor may borrow suitable material at any place or in any manner most convenient for him, provided these borrows are outside of the road lines and do not affect the drainage of the road. Where such borrows cannot be easily cross sectioned the basis of settlement will be figured on the amount of embankment furnished as indicated under the heading "Excavation Quantities". Work of this nature is classified as "Special Borrows".

Overhaul of Excavation.—When the distance between the center of gravity of any cut and the center of gravity of the corresponding embankment exceeds a distance of five hundred (500) feet, all of the material obtained from the cut and used in the embankment shall be known as overhaul excavation, and the length of overhaul shall be measured as the distance between center of gravity of cut and center of gravity of fill minus the specified free haul distance of 500 feet.

Subgrade.—Where the road is to be surfaced, the subgrade shall consist of good, sound earth brought to the proper elevation, alignment, and cross section, and when ordered by the engineer shall be rolled until firm and hard. The rolling shall be done with a self-propelled roller of macadam type approved by the engineer, weighing not less than 10 tons and not more than 15 tons. When the rolling is completed the surface of the sub-grade shall conform to the cross section elevation and alignment shown on the plans and shall be so maintained until the surfacing material is in place.

Shoulders.—Where the road is to be surfaced with some material other than earth, shoulders shall be constructed as a part of the excavation and embankment. The manner in which the shoulders shall be built up, shaped, and compacted is described in the specifications covering the base course and surfacing.

Excavation Quantities.—The quantities of material moved shall be measured in excavation, and computed by means of the method of average and areas. In taking the measurements the engineer will include unavoidable overbreaks in solid rock excavation, not to exceed, in any half station of 50 feet, ten (10) per cent of the theoretical quantity of excavation required for the same half station. Unavoidable slides occurring after the section has been completed or slides of [fol. 32] loose rock which must be removed before the section can be finished according to the original cross section will also be measured and included in the estimate. Other material excavated outside of the lines shown on the plans, or established by the engineer in case of borrow pits, will be disregarded in preparing the estimates and will be at the contractor's expense. The amount of excavation from "Special Borrows" will be determined by computing the amount of finished compacted embankment furnished from such borrow measured in embankment with no allowance for shrinkage. The amount of excavation for machine grading will not be figured as this item is paid for by the mile except for special materials as indicated under the heading "Machine Grading."

Finishing Earth Roads.—After all excavation and embankment, and all structures are complete, the entire surface of the road shall receive a finish shaping with a grading machine. When the finish shaping is complete the road surface shall conform accurately to the typical cross section shown on the plans, and no roots, sod, or other deleterious matter, nor stones that would fail to pass a 3-inch ring shall be within 6 inches of the finished surface.

Basis of Payment.—The ontractor will be paid for the work included under the general heading "Excavation and Embankment" according to the following plan:

1. Roadway excavation will be paid for at the unit prices bid unclassified Exc. and emb. items 41, 42 and 43. Payment, based on these unit prices, shall be full recompense for all work specified under the sub-headings "Clearing and Grubbing," "Roadway Excavation," "Embankments," "Disposal of Surplus Materials," "Borrow Excavation," "Shoulders," "Sub-grade" and "Finishing Earth Roads."

2. Excavation for structures will be paid for at the price bid for excavation of this kind. Payment based on this price shall be full recompense for all work done in excavating and back-filling the material and for all other incidental work specified under the sub-heading "Excavation for Structures."

3. Overhaul of excavation will be paid for at the rate bid for overhaul per cubic yard per station of 100 feet. The amount of overhaul will be estimated in the manner specified under the subheading "Overhaul of Excavation."

4. Back fill in rock cuts as provided under roadway excavation shall be paid for at the unit price bid for emb. item [fol. 33] No. 1. Any overhaul will be paid for at price bid for overhaul item No. 45.

Subbase.

Description.—This "Subbase" shall consist of approved stone placed in excavations made by the removal of soft, unstable or other unsuitable subgrade materials, and shall be constructed, where directed, in accordance with these specifications.

Material.—The material to be used shall consist of sound, tough, durable telford stone, napped field or quarry stone, crushed rock or slag, or gravel. The "Telford" stone shall be approximately rectangular in section, from two (2) to six (6) inches in width, six (6) to twelve (12) inches in length and eight (8) inches in depth; the field or quarry stones shall not be more than five (5) inches in their largest dimension after napping; and the crushed rock, slag or gravel shall consist of pieces varying from one to one-quarter (1¼) to three and one-half (3½) inches in diameter. All stone shall be approved before being used.

Construction Methods.—Unsuitable subgrade materials shall be removed, and the bottom of the excavation shaped uniformly and compacted firmly, and the stone placed in the excavation. If "Telford" stones are used, they shall be laid at right angles to the center line of the roadway and rammed in layers of not more than eight (8) inches in depth; or if napped field or quarry stone, crushed rock, slag or gravel is used, it shall be spread and rammed in layers of not more than five inches. When delivered this material shall be dumped along the sides of the roadway and not directly into the excavation, but shall be placed carefully therein by hand or with shovels. After the material has been placed and rammed in layers until slightly above the surrounding subgrade surface, it shall be rolled and the voids filled with small stones, the rolling and filling being continued until the entire mass is compacted thoroughly and satisfactorily. The finished surface shall conform to the grade and cross-section of the surrounding sub-grade.

Basis of Payment.—This work will be paid for at the contract unit price per cubic yard for "Subbase" complete in place, which price will include all excavation, materials, equipment, tools, labor, and work incidental thereto, also the disposal of the excavated materials.

[fol. 34] Drainage Structures

All concrete and masonry culverts, and walls for pipe culverts, retaining walls, catch basins, drop inlets, etc., shall be built of Class "B" concrete and according to the plans and specifications therefor.

Pipe Culverts and Siphons.—Pipe culverts and siphons shall be constructed of the length specified and wherever indicated on the plans or directed by the engineer, in writing. Typical plans for the guidance of the contractor will be furnished for each particular kind of pipe culvert and siphon required.

Corrugated Metal.—Corrugated metal pipe for culverts shall pre pro-erly fabricated from corrugated galvanized sheets of steel or iron, free from blisters, seams, slag or other foreign material. Each culvert shall be made from the same quality of metal and the sheets of metal before galvanizing shall be not less than 16 gauge, U. S. Standard, for pipe having a diameter of 20 inches or less, and not less than 14 gauge, U. S. Standard, for pipe between 20 and 42 inches in diameter. The corrugations shall be not less than 2½ inches, or more than 2¾ inches from crest to crest and shall have the depth of not less than one-half, or more than five-eighths inch.

The galvanizing shall consist of not less than two ounces of prime smelter per square foot uniformly distributed over the surfaces of the sheets of metal and free from imperfections of any kind. It shall be applied in such manner that the spelter will not peel off during fabrication or in transporting and laying the pipe. The amount of spelter per square foot will be determined by the lead acetate method upon a sample taken from the culvert. Pipe having bare or uncoated spots will be rejected.

All joints shall be even and close and the jointed pipe shall be straight, circular in section, true and rigid.

In the longtitudinal joints, rivets shall be driven in the valley of each corrugation and in the transverse joints, rivets shall be uniformly spaced not more than six inches apart. The rivets shall be driven in such a manner as to draw the sheets tightly together, and to completely fill the rivet holes. The rivets shall have neat, workmanlike, semispherical or flat heads, and shall be at least one inch from the edge of the sheets.

[fol. 35] All rivets shall be of the same quality of metal as the sheets in which they are used. They shall be thoroughly galvanized and shall be not less than five-sixteenths of an inch in diameter. The heads of the rivets shall have

a diameter of not less than one and five-tenths times the diameter of the rivet plus one-eighth of an inch, and all flat heads shall have a thickness of not less than six-tenths that of the diameter of the rivet.

All pipe shall be furnished in the lengths ordered, except that pipe for culverts more than 30 feet in length may be furnished in sections not less than 15 feet in length, provided the manufacturer furnishes field connections, free of any charge. The connections shall consist of bands not less than eight inches in width, made from the same material as the pipe, properly fitted with malleable cast iron lugs, provided with galvanized bolts, not less than three-eighths of an inch in diameter. The connection shall be so fabricated that a secure and firm connection of the sections of pipe may be readily made in the field.

The diameter of the metal pipe shall be understood to mean the clear diameter. For example, a pipe 18 inches in diameter shall be of such size that a sphere 18 inches in diameter may be rolled through it except for interference by rivet heads.

All pipe shall be so loaded for shipment that it will arrive at its destination with all galvanizing intact and free from bruises.

Construction Methods.—All pipe shall be laid true to the lines and grades furnished by the engineer, and the bottom of the trench shall be so rounded and prepared that the pipe will be uniformly supported throughout its length. Wherever solid rock occurs in a culvert trench it shall be excavated to a depth of at least 6 inches below the pipe and the space thus made refilled with selected fine material. In like manner, earthy material that is not sufficiently firm to support the pipe uniformly shall be excavated and replaced by selected fine material, and in backfilling no material shall be placed immediately around the pipe, that would not insure uniform pressure on the pipe. The earth covering above the pipe shall not be less than 8 inches deep.

Basis of Payment.—All pipe culverts will be paid for by the lineal foot in place at the respective prices bid for the different kinds of pipe. These prices shall be payment in [fol. 36] full for all pipe, joint, materials, etc., and for all

labor employed in laying the pipe, connecting the joints and backfilling, but will not include payment for excavation nor for concrete or masonry end walls.

Concrete Structures

Portland cement concrete structures shall be built where called for on the plans, or directed in writing by the engineer.

Classes of Concrete.—In general, only three (3) classes of concrete will be used. Special structures requiring other classes of concrete than those provided for below, or requiring modifications in the materials used, will be provided for by means of detail plans or detail specification clauses hereinafter given and covering each particular kind of special structure.

Class A concrete shall consist (by volume) of one (1) part cement, two (2) parts sand and four (4) parts of coarse aggregate; the latter ranging in size uniformity from ¼ inch up to 1 inch. All reinforced concrete, culvert tops and plain concrete, eight (8) inches or less in thickness, shall be of Class A concrete.

Class B concrete shall consist (by volume) of one (1) part of cement, two and one-half (2½) parts of sand and five (5) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch to 2½ inches. Abutments, retaining walls, end walls of culverts and other work as specified, shall be of Class B concrete.

Class C concrete shall consist (by volume) of one (1) part of cement, three (3) parts of sand and six (6) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch up to 2½ inches. Culvert floors, footings of abutments and retaining walls, and other work as specified shall be of Class C concrete.

Concrete Materials.—The materials used in the various classes of concrete shall be specified below:

Portland Cement.—All Portland cement shall meet the requirements of the United States Bureau of Standards, Circular 33. Portland Cement for all classes of concrete shall meet the requirements of Standard Specifications and Tests for Portland Cement, of the American Society for

Testing Materials; Serial designation 79-17 adopted 1904 and revised 1916.

[fol. 37] Sand.—The sand for all classes of concrete shall consist of clean, hard, durable, uncoated stone particles, preferably siliceous, free from organic matter and lumps of clay. It shall be graded from coarse to fine so that all will pass a ¼ inch mesh screen, not more than 25 per cent shall pass a 50 per mesh sieve, and more than 5 per cent shall pass a 100 mesh sieve. It shall contain not more than three per cent of material removable by the elutriation test.

When the sand is mixed with Portland cement, in the proportion of one (1) part of cement to three (3) parts of sand, by weight according to standard methods of making 1.3 mortar briquets, the resulting mortar, at the ages of both 7 and 28 days, when compared with mortar mixed at the same time in the same proportions and consistency using the same cement with Ottawa sand. shall show a tensile strength ratio of one hundred (100) per centum, except that sand giving a strength ratio of less than one hundred (100) per centum but not less than eighty-five (85) per centum will be accepted for use in concrete, subject to the use of additional cement. The additional proportion of cement required will be determined by laboratory tests and shall be the percentage required to increase the said ratio to one hundred (100) per centum.

Coarse Aggregate.—The coarse aggregate for all classes of concrete shall consist of clean, hard, durable, crushed -tone or gravel, free from any coating of clay or slime. Material containing organic matter, shale, distintegrated or rotten boulders, clay, or other deleterious substance, may be rejected by the engineer without testing.

For Class A concrete the coarse aggregate shall be such that all will pass a screen having one-inch openings, and be retained on a ¼ inch screen, having no intermediate sizes removed.

For Class B and Class C concrete the coarse aggregate shall be such that all will pass a screen having 2½ inch circular openings, and be retained on a one-quarter inch screen, having no intermediate sizes removed.

For all classes of concrete, the coarse aggregate shall be well graded in size particles between the upper and lower limits specified.

With the approval of the engineer boulders and large fragments of rock may be imbedded in Class C concrete. Each stone before being imbedded or placed shall be washed [fol. 38] clean of all clay, dirt or other deleterious matter, and only sound, tough stone shall be used. No boulders shall be placed closer to each other, or to any part of the forms, than 3 inches. Each stone shall be thoroughly soaked before being placed.

Water.—The water used in mixing concrete shall be fresh and reasonably clear, free from oil, acid, alkalies, and organic matter.

Forms.—The forms shall be well built, substantial, and unyielding, and securely braced or tied together by wire or rods so that the finished concrete shall conform accurately to the dimensions and shapes shown on the plans. They shall be sufficiently tight to prevent the leakage of mortar. If the forms bulge or sag at an point when the concrete is placed in them, the portion of concrete causing the distortion shall be immediately removed and the forms properly repaired and strengthened before continuing the work. For all exposed concrete surfaces the form lumber shall be dressed. Suitable mouldings shall be placed in the forms to make beveled corners and filleted angles on the concrete wherever corners and angles are necessary. Forms shall be smooth and clean when the concrete is placed against them and shall be built in such manner that they may be conveniently removed without injury to the concrete.

Removal of Forms.—All forms shall be left in place not less than 12 hours. Centers shall not be struck from under arches and spans having beams or girders in less than 28 days, except in the case of arch culverts or less than 10 foot span.

In general, forms shall not be removed from concrete, including arches of less than 10-foot span, in less than 21 days of good settting weather at a temperature over 50 degrees Fahr.

Forms shall not be removed from under concrete which has been placed at a temperature under 50 degrees Fahr., without first determining if the concrete has properly set, without regard to the time element.

Forms shall always be removed from columns before removing shores from beneath beams and girders, in order to determine the condition of the column concrete.

No forms whatever shall be removed at any time without first notifying the engineer in charge, who will ascertain if [fol. 39] the concrete be set sufficiently hard and so notify the Contractor.

Construction Methods

Mixing.—Unless hand-mixing is specifically permitted by the engineer, the mixing shall be done in a batch mixer of approved type which will insure the uniform distribution of the materials throughout the mass, so that the mixture is uniform in color and smooth in appearance. The mixing shall continue for a minimum time of two (2) minutes after all the ingredients are assembled in the drum, during which time the drum shall revolve at the speed for which it was designed, but shall not make less than fourteen (14) nor more than twenty (20) revolutions per minute. The entire contents of the drum shall be discharged before any materials are placed therein for the succeeding batch.

When it is necessary to mix by hand the mixing shall be done on a watertight platform, preferably in the following manner: The sand shall be spread out to a uniform depth, the cement spread evenly over it, and the two mixed until the mass is uniform in color. Over this mixture of sand and cement the stone or gravel shall be spread and water shall be added as the mass is turned over and mixed. The ingredients may be assembled and mixed in other order than the above, but in any case they shall be turned together at least six times and until the mixture is homogeneous in color and appearance.

In any case the resulting mixture must be of uniform consistency and color with the stones thoroughly mixed with the sand, cement and water. The concrete shall be wet enough to flush readily under light tamping, but can be

handled without separation of the coarse aggregate from the mortar. The quantity of water shall be modified as directed by the engineer, to meet the conditions of the work being placed.

Placing.—After the completion of the mixing the concrete shall be deposited in place and rammed, tamped, or otherwise compacted so as to fill the forms completely and to surround all parts of the steel reinforcement. This must be done promptly and all handling or tamping shall be completed before the concrete has acquired an initial set. Conveying concrete in chutes will be permitted, but it shall not be dropped from a greater height than five feet and no method of handling will be permitted which allows the different ingredients to become segregated or partially separated.

[fol. 40] Concrete shall be deposited in horizontal layers of a uniform thickness not exceeding 12 inches. In floor slabs the concrete shall be placed for the full thickness of the slab and its construction carried along in this manner. Before depositing the concrete in the forms, the latter shall be thoroughly clean on the faces adjoining the concrete, and the space to be occupied by the concrete shall be free from dirt, sawdust, and all other material detrimental to concrete. The concrete next to the forms or centers shall be spaded so that sufficient mortar will exude from the mass to form a smooth surface.

Concrete shall not be mixed or deposited when freezing temperature prevails or threatens, and in case freezing weather develops after the concrete is placed, ample provisions shall be made to protect it from freezing until it is at least four (4) days old. Care should be taken to protect concrete against freezing weather which may occur at night.

Concrete shall not be deposited under water except by consent of the engineer and under his immediate supervision. No permission will be given to deposit concrete in running water and where it is deposited in still water a tremie or chute shall be used.

Joints.—Expansion joints, to provide for shrinkage and contraction shall be constructed where and as indicated on the plans. Care shall be taken in construction that these

joints are so made as to permit a free movement at the joint when the concrete expands and contracts.

Construction of field joints will be permitted when necessary but must be made in such places and in such manner that they will have the least possible effect on the strength of the structure. Reinformed beams, slabs, girders and other important primary members shall be cast continuously unless field joints are shown in plans. Field joints shall be made with faces at right angles to the direction of stress. No joints shall be made with the concrete sloping to a thin edge. Bulkheads shall be used in constructing all joints, other than horizontal.

When work is suspended and a field joint is to be made, there shall be provisions for bonding subsequent work to that already in place by means of projecting reinforcing rods or suitable grooves.

When the placing of concrete is to be resumed the joint surface of the concrete already in place shall be thoroughly [fol. 41] cleaned of dirt and lattance, well wetted, and then flushed with cement grout. Fresh concrete shall then be placed promptly over the joint thus prepared.

Finish.—Except as otherwise noted on the plans, all surfaces shall have a plain, spaded or troweled finish. All surfaces shall be even and free from voids, with no coarse aggregate showing. Tops of floor slabs and arches shall have a uniformly smooth, dense, floated surface. Exposed surfaces shall be more carefully finished, and shall be uniform and of good appearance. Railings, copings, etc. shall be given particular attention, and finished in the manner indicated on the plans.

Forms covering surfaces which require a careful finish shall be removed as soon as conditions permit and if minor defects are apparent in the finish, the surface may be repaired with cement mortar rubbed on with a wooden float.

Plastered surfaces will not be permitted. Washed, rubbed, or tooled surfaces will not be required unless specified on plans, except where necessary in order to repair plain spaded surfaces that do not conform to the specifications for same.

Protection.—All concrete shall be properly protected from extremes of heat and cold until well seasoned. Sur-

faces exposed to premature drying shall be kept covered and shall be kept damp for at least five days.

Defective Work.—Any defective work discovered after the forms have been removed, shall be removed immediately and renewed. If the surface of the concrete is bulged, uneven, or shows excess honeycombing or form joint marks, which, in the opinion of the engineer, cannot be repaired satisfactorily, the entire section shall be removed or renewed. No compensation will be allowed for the work described above.

Basis of Payment.—The bid prices per cubic yard, for the various classes of concrete, will be payment in full, for all concrete materials, forms, labor, and incidental expenses entering into concrete construction, and will also include the placing of all pipes, conduits, anchors, bolts, grillages and other similar material; except that wherever reinforcing steel is called for on the plans, it will be paid for separately from the concrete, as provided below. The use of reinforcing steel, however, will not serve to change the rate of payment for the various classes of concrete in [fol. 42] which the steel may be used. No additional allowance will be made for cofferdams, pumping or bailing, or for any material or labor on account of water.

Pit Run Aggregate.—With the approval of the engineer, end walls of culverts, and footings of abutments and retaining walls may be constructed of pit run aggregate provided tests of such aggregate indicate that the proportions of coarse and fine materials do not vary more than 10% from the proportions herein specified for classes B and C concrete.

Reinforcement

Description.—All reinforcement for concrete structures shall consist of deformed or plain bars, expanded metal or wire cloth, or structural steel shapes, unless otherwise specified.

Deformed and Plain Bars.—All deformed and plain bars shall be made of mild or medium open hearth steel and shall be free from dirt, oil, paint, grease, mill-scale or loose thick rust. High carbon or rerolled steel shall not be used.

All bars shall be capable of bending cold through one hundred and eighty (180) degrees around their own diameter without fracture and must have a yield point of not less than thirty-three thousand (33,000) pounds per square inch. When the length of reinforcing bars is such as to require splicing, they shall be lapped for a distance of forty—(40) diameters for deformed bars, and fifty (50) diameters for plain bars. They may be securely fastened together by means of metal clips, bolted around the bars, and if not so clipped they shall be placed one (1) inch apart. The sizes shown on the plans are in all cases for the side of a square bar. If other sections are used the area shall be equivalent to that indicated. On all deformed bars the minimum sectional area of the bar will be counted, not the average.

Expanded Metal or Wire Cloth.—Expanded metal or wire cloth shall be in accordance with Standard Specifications of the American Society for Testing Materials, standard specifications for concrete Billet Steel Reinforcement Bars, Serial Designation A15-14, and shall be free from dirt, oil, grease, scale or rust.

Structural Steel Shapes.—Structural steel shapes used for reinforcement shall be in accordance with Standard Specifications of the American Society for Testing materials, standard specifications for structural steel for bridges. Serial Designation A7-16.

[fol. 43] Placing Reinforcement.—All reinforcement shall be placed accurately as shown on the plan, and at each intersection rods shall be securely fastened together with wire or metal clips. All the reinforcements necessary for a section of concrete shall be placed and approved before concrete is deposited in the section, and care shall be observed not to disturb it during the placing of the concrete.

Basis of Payment.—This material will be paid for at the contract unit price per pound as per square foot, as the case may be for "Deformed Steel Bars," "Plain Steel Bars," "Expanded Metal" or "Wire Cloth," or "Structural Steel Shapes," complete in place, which price will include furnishing and placing the material and all equipment, tools, labor and work incidental thereto. No allowance will be made for the clips, wire or other mechanical means used for fastening reinforcement in place.

Rubble Masonry

Dry Rubble Masonry:

Description.—Dry rubble masonry shall be composed of approved rubble stone laid without the aid of mortar so as to fit nearly and firmly, and shall be constructed in such sections and at such places as indicated on the plans and where directed in accordance with these specifications.

Stone.—All stone for this work shall be rubble stone of approved quality, sound, free from structural defects, earth, clay or other foreign substances, and from which all weak points and angles have been removed. Selected stones, roughly squared and pitched to line, shall be used at all angles and ends of walls. The stones for the faces of the wall shall not be less than six (6) inches thick nor less than twelve (12) inches in length. The width shall not be less than the thickness, and the volume shall not be less than one-half (½) cubic foot. Small stones of similar quality may be used for pinning and for the interstices in the heart of the wall.

Construction Methods.—All dry rubble masonry shall be constructed by men experienced in this class of work. All stone shall be laid on their natural beds in courses, breaking vertical joints at least six (6) inches. The stones shall be dressed to a reasonably true face and bed and shall be laid to the shapes and dimensions shown on the plans for the structure. No face joint shall exceed two (2) inches on its greatest width of opening. Headers shall be distributed uniformly through the walls of the struc- [fol. 44] tures, so as to form at least one-fifth (⅕) of the exposed faces, and shall extend through the face wall and into the backing a distance at least equal to their thickness. Where a wall is less than two feet in thickness, the headers shall extend entirely through from front to back face. Where the wall is more than two (2) feet thick the headers shall extend either entirely through, or everlap at least 6 inches. The foundation courses shall be of large stones not less than eight (8) inches in thickness and containing not less than six (6) square feet area of bed. The thinnest courses invariably shall be placed towards the top of the wall. The stones shall be laid so as to form a substantial

wall and shall fit neatly. No spalls shall be used in the front or face wall, but all interstices in the heart of the wall shall be filled with spalls. The top of the wall shall be finished with a stone coping of roughly scappled stones six (6) inches thick, and fourteen (14) inches wide and not less than twenty-four (24) inches in length.

Refilling.—The excavated areas which are not occupied by the masonry structure shall be refilled with acceptable material in layers of not more than six (6) inches in depth. Each layer shall be tamped thoroughly and until the refilling is level with the original ground.

Basis of Payment.—This work will be measured in accordance with dimensions shown on the plans, except where changes are ordered during construction, and will be paid for at the contract unit price per cubic yard for "Dry Rubble Masonry" complete in place, which place will include all materials, equipment, tools, labor and work incidental thereto.

Cement Rubble Masonry.—Structures of cement rubble masonry shall be built where called for on the plans, or directed in writing by the engineer.

Materials.—The Portland Cement, sand and water for the mortar, shall be such as to conform with the respective requirements for these materials as contained in the specifications hereinbefore given for Portland cement concrete. The stone shall be sound and durable, and shall be free from rounded, worn or weathered surfaces. No stone shall be used which has a minimum thickness of less than 5 inches, a minimum width of less than 12 inches, or which is less than ½ or one cubic foot in volume.

Construction.—All rubble masonry shall be constructed by experienced masons and the engineer may require the [fol. 45] contractor to produce evidence that the men he employs on such work have had satisfactory previous experience. The stones shall be dressed to a reasonably true face and bed, and shall be laid true to the shape and dimensions of the structure, as shown on the plans. They shall be bedded in Portland Cement mortar, mixed in the proportion of 1 part of cement to 3 parts of sand, and

shall be so placed as to break joints and form to form at least ⅓ of the exposed faces. They shall be of such lengths as to extend through the face wall and into the backing a distance at least equal to the thickness of the headers, and where a wall is less than twenty inches in thickness, the headers shall extend entirely through from front to back face. The interior of the walls shall be built up so that no open spaces will be left. For this purpose mortar and spalls may be used in reason, though sufficient larger stone shall be used to keep the work thoroughly bonded. No spalls shall be used in the face of a wall, and the face stones shall be so well bedded that none will be needed. Walls shall be provided with "weep holes" wherever these are called for on the plans or directed by the engineer. Where no coping is called for on top of a wall, the top course shall be selected stones, such that only transverse joints will occur in the course.

After the stone is all laid as above specified, the face joints shall be thoroughly cleaned of all mortar to a depth of 1 inch. The joints shall then be soaked with water and painted with Portland cement mortar, mixed in proportion of 1 part of cement to 1 part of sand. No pointing shall be done in freezing weather.

Basis of Payment.—Cement rubble masonry will be paid for at the bid price per cubic yard, which shall be payment in full for all materials, labor and incidentals entering into such construction. In determining the volume of masonry structures the plan dimensions will be used, and no allowance will be made for work done outside the neat lines indicated on the drawings.

Concrete Bridges

Substructures and Reinforced Concrete Superstructures

Excavation:

1. Description.—Excavation shal consist of the removal of the old structure, unless otherwise specified, including the abutments, piers, and wings, and all other materials, [fol. 46] obstructions, etc., necessary to the placing of concrete and masonry foundations for structures, stream

changes, waterways, etc., in conformity with the plans or as may be directed. It shall include all clearing and grubbing the removal of necessary materials, furnishing and placing of cofferdams, etc., refilling the excavated area around the structures to the elevation of the original adjacent surfaces after the concrete or masonry has been placed, shaping and sloping, and the disposal of the surplus material; all of which shall be done in accordance with the dimensions given and in conformity with these specifications.

2. Removal of Excavation.—The contractor shall notify the Engineer a sufficient time in advance of the beginning of excavation for structures, stream changes, waterways, etc., so that the cross-sectional elevations and measurements may be taken of the existing ground and structure. Any materials removed or excavated before these measurements have been taken may not be paid for. Any stone in the abutments, piers and wing walls which is to be torn out and which is suitable for use in the new work shall become the property of the Contractor, unless otherwise specified, and the removal of any such material in the substructure will be considered as excavation.

Timber and metal cofferdams, when used, shall be sunk to a depth well below the bottom of the excavation, shall be substantially braced in all directions and of such construction as will permit them to be pumped free of water and kept free until the concrete has set. They shall be of such size that leakage can be kept out of the concrete or masonry area. Unless otherwise shown on the plan or agreed upon, cofferdams and all sheeting and bracing shall be removed after the completion of the concrete or masonry. When the bottom is of sandy or other porous material which will not, in the opinion of the Engineer, permit the cofferdam to be pumped dry, when excavated to the correct elevation, it shall be sealed with sufficient concrete so that it may be pumped dry. This concrete shall be proportioned as directed and shall have twenty-five per cent of additional cement as herein provided for concrete placed under water.

3. Refilling.—After the structure has been completed the areas around the walls shall be filled with approved material in layers of not more than six (6) inches in depth and compacted satisfactorily to the level of the original surrounding surfaces. Materials which will not compact [fol. 47] readily shall not be used in this work. In no case shall surplus material be dumped in the channell of the stream.

4. Method of Determining Excavation Quantities.—All excavations will be measured in its original position by the cross-section method, to ascertain the amount of material removed, which cross-sections will include the removal of all concrete and masonry walls, etc. No allowance will be made for foundation excavation in excess of one (1) foot beyond the outer limits of the foundations. Clearing and grubbing and the removal of obstructions, etc., will not be measured, but will be included in the price for excavation.

"Dry Excavation" shall include all materials excavated above the actual elevation of the water line at the time the work is started.

"Wet Excavations" shall be measured from the water line at the time the work is started to the bottom of the foundation.

5. Basis of Payment.—This work will be paid for at the contract unit price per cubic yard for "Dry excavation" or "Wet excavation," as the case may be, which price will include the removal of the excavated material, refilling, disposal of surplus material and all equipment, machinery, tools, labor and work incidental thereto. No additional compensation will be made for clearing and grubbing, cofferdams, bracing, shoring, pumping or bailing, or for any materials or labor necessary on account of water.

Cement Concrete

Cement Concrete:

6. Classes of Concrete.—In general, only three (3) classes of concrete will be used. Special structures requiring other classes of concrete than those provided for below, or requiring modifications in the materials used, will

be provided for by means of detail plans or detail specification clauses hereinafter given and covering each particular kind of special structure.

Class A concrete shall consist (by volume) of one (1) part cement, two (2) parts sand and four (4) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch up to 1 inch. All reinforced concrete, culvert tops and plain concrete, eight (8) inches or less in thickness, shall be of Class A concrete.

Class B concrete shall consist (by volume) of one (1) part of cement, two and one-half (2½) parts of sand and [fol. 48] five (5) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch to 2½ inches. Abutments, retaining walls, end walls of culverts and other work as specified, shall be of Class B Concrete.

Class C concrete shall consist (by volume) of one (1) part of cement, three (3) parts of sand and six (6) parts of coarse aggregate; the latter ranging in size uniformly from ¼ inch to 2½ inches. Culvert floors, footings of abutments and retaining walls, and other work as specified shall be of Class C concrete.

7. Concrete Materials.—The materials used in the various classes of concrete shall be as specified below:

Portland Cement.—All Portland cement shall meet the requirements of the United States Bureau of Standards, Circular 33. Portland cement for all classes of concrete shall meet the requirements of the Standard Specifications and Tests for Portland Cement, of the American Society for Testing Materials; Serial designation 79-17 adopted 1904 and revised 1916.

Sand.—The Sand for all classes of concrete shall consist of clean, hard, durable, uncoated stone particles, preferably siliceous, free from organic matter and lumps of clay. It shall be graded from coarse to fine so that all will pass a ¼ inch mesh screen, not more than 25 per cent shall pass a 50 per mesh sieve, and not more than 5 per cent shall pass a 100 mesh sieve. It shall contain not more than three per cent of material removable by the elutriation test.

When the sand is mixed with Portland cement, in the proportion of one (1) part of cement to three (3) parts of sand, by weight, according to standard methods of making

1:3 mortar briquets, the resulting mortar, at the ages of both 7 and 28 days, when compared with mortar mixed at the same time in the same proportions and consistency using the same cement with Ottawa sand, shall show a tensile strength ratio of one hundred (100) per centum, except that sand giving a strength ratio of less than one hundred (100) per centum but not less than eighty five (85) per centum will be accepted for use in concrete, subject to the use of additional cement. The additional proportion of cement required will be determined by laboratory tests and shall be the percentage required to increase the said ratio to one hundred (100) per centum.

Coarse Aggregate.—The coarse aggregate for all classes of concrete shall consist of clean, hard, durable, crushed [fol. 49] stone or gravel, free from any coating or clay or slime. Material containing organic matter, shale, disintegrated or rotten boulders, clay, or other deleterious substance may be rejected by the engineer without testing.

For Class A concrete the coarse aggregate shall be such that all will pass a screen having 1-inch openings, and be retained on a ¼-inch screen, having no intermediate sizes removed.

For Class B and Class C concrete the coarse aggregate shall be such that all will pass a screen having 2½ inch circular openings, and be retained on a one-quarter inch screen, having no intermediate sizes removed.

For all classes of concrete, the coarse aggregate shall be well graded in size of particles between the upper and lower limits specified.

With the approval of the engineer boulders and large fragments of rock may be imbedded in Class C concrete. Each stone before being imbedded or placed shall be washed clean of all clay, dirt, or other deleterious matter, and only sound, tough stone shall be used. No boulders shall be placed closer to each other, or to any part of the forms, than three inches. Each stone shall be thoroughly soaked before being placed.

Water.—The water used in mixing concrete shall be fresh and reasonably clear, free from oil, acid, alkalies and organic matter.

8. Approval of Material Sources of Supply.—Sources of supply of Portland cement and fine coarse aggregate shall

be approved by the Engineer before delivery of materials is started.

On large or important structures samples of concrete materials, or of the concrete may be required for testing. If required, samples of concrete materials for testing purposes shall be supplied to the Engineer free of charge. Such samples shall be submitted far enough in advance of the using of materials to allow the Engineer to forward them to the laboratory for testing. The laboratory will usually need at least ten days for seven-day tests and thirty-one days for twenty-eight-day tests.

Cylinders of concrete from these samples made and tested in accordance with methods prescribed by the Engineer shall develop compressive strengths as follows:

[fol. 50] Crushing Strength in Pounds per Square Inch

	Mix		
	1, 2, 4	1, 2½, 5	1, 3, 6
Age seven (7) days	1,600	1,300	1,000
Age twenty eight days	2,000	1,600	1,300

If the specimens fail to fulfill the requirements for seven (7) day tests the concrete may be accepted, if specimens fulfill the requirements for twenty eight day tests.

9. Falsework.—Falsework shall be built on good firm foundation and be of sufficient strength to carry the loads without appreciable deformation. It shall be constructed with 1 20-inch camber for each foot of span, and, if necessary, wedges shall be kept driven as the weight of concrete is added so that the bottom of the slab will not drop below the lines shown on the plans. If appreciable settlement occurs in the false work the engineer shall stop the work and require a thorough remodeling to insure a first-class product. For continuous girders and large structures or when trussed centers or special means of support other than ordinary falsework are to be used detail drawings of same shall be submitted for approval.

10. Forms.—Forms shall be so designed and constructed that they may be removed without injuring the concrete.

The material to be used in the forms for exposed sur-

faces shall be sized and dressed lumber, not less than 1½ inches in thickness, or metal in which all bolt and rivet heads are countersunk, so that in either case a plain, smooth surface of the desired contour is obtained. Undressed lumber may be used for backing or other exposed surfaces.

The forms shall be built true to line, and braced in a substantial and unyielding manner. They shall be mortar tight and, if necessary to close cracks due to shrinkage, shall be thoroughly soaked with water. Forms for re-entrant angles shall be chamfered and four corners shall be filleted. Dimensions affecting the construction of subsequent portions of the work shall be carefully checked after the forms are erected and before any concrete is placed. The interior surfaces of the forms shall be adequately wetted or oiled. Form lumber which is to be used a second time shall be free from bulge or warp and shall be thoroughly cleaned. The forms shall be inspected immediately preceding the placing of concrete, any bulging or warping [fol. 51] shall be remedied and all dirt, saw dust, shavings, or other debris within the forms shall be removed.

11. Removal of Forms.—All forms shall be left in place not less than 12 hours. Centers shall not be struck from under arches and spans having beams or girders in less than 28 days, except in the case of arch culverts of less than 10-foot span.

In general, forms shall not be removed from concrete, including arches of less than 10 foot span, in less than 21 days of good setting weather at a temperature over 50 degrees Fahr.

Forms shall not be removed from under concrete which has been placed at a temperature under 50 degrees Fahr., without first determining if the concrete has properly set, without regard to the time element.

Forms shall always be removed from columns before removing shores from beneath beams and girders, in order to determine the condition of the column concrete.

No forms whatever shall be removed at any time without first notifying the engineer in charge, who will ascertain if the concrete be set sufficiently hard and so notify the contractor.

The minimum time for the removal of forms (not the supporting shores) shall be as follows:

For bottom of slab four days for spans 4 ft. or less plus 1 day extra for each additional foot of span.

For sides of beams and girders 7 days.

For columns and piers 4 days.

For bridge arches 28 days.

For monolithic piers and abutments 36 hours.

The minimum time for the removal of shores shall be as follows:

For bottoms of beams and girders 21 days for spans of 10 ft. or less plus 1½ days for each additional foot of span.

The original shores must in no case be taken down, replaced or disturbed until permitted by the Engineer in charge.

[fol. 52] Construction Methods

12. Mixing.—Unless hand-mixing is specifically permitted by the Engineer, the mixing shall be done in a batch mixer of approved type which will insure the uniform distribution of the materials throughout the mass, so that the mixture is uniform in color and smooth in appearance. The mixing shall continue for a minimum time of two (2) minutes after all the ingredients are assembled in the drum, during which time the drum shall revolve at the speed for which it was designed, but shall make not less than fourteen (14) nor more than twenty (20) revolutions per minute. The entire contents of the drum shall be discharged before any materials are placed therein for the succeeding batch.

When it is necessary to mix by hand the mixing shall be done on a watertight platform, preferably in the following manner; the sand shall be spread out to a uniform depth, the cement spread evenly over it, and the two mixed until the mass is uniform in color. Over this mixture of sand and cement the stone or gravel shall be spread and water shall be added as the mass is turned over and mixed. The ingredients may be assembled and mixed in other order than the above, but in any case they shall be turned together at least six times and until the mixture is homogeneous in color and appearance.

In any case the resulting mixture must be of uniform consistency and color with the stones thoroughly mixed with the sanem cement and water. The concrete shall be wet enough to flush readily under light tamping, but can be handled without a separation of the coarse aggregate from the mortar. The quantity of water shall be modified as directed by the engineer, to meet the conditions of the work being place-.

13. Placing.—After the completion of the mixing the concrete shall be deposited in place and rammed, tamped, or otherwise compacted so as to fill the forms completely and to surround all parts of the steel reinforcement. This must be done promptly and all handling or tamping shall be completed before the concrete has acquired an initial set. Conveying concrete in chutes will be permitted, but it shall not be dropped from a greater height than 5 feet and no method of handling will be permitted which allows the different ingredients to become segregated or partially separated.

Concrete shall be deposited in horizontal layers of a uniform thickness, not exceeding 12 inches. In floor slabs the [fol. 53] concrete shall be placed for the full thickness of the slab and its construction carried along in this manner. Before depositing the concrete in the forms, the latter shall be thoroughly clean on the faces adjoining the concrete, and the space to be occupied by the concrete shall be free from dirt, sawdust, and all other material detrimental to concrete. The concrete next to the forms or centers shall be spaded so that sufficient mortar will exude from the mass to form a smooth surface.

Concrete shall not be mixed or deposited when freezing temperature prevails or threatens, and in case freezing weather develops after the concrete is placed ample provision shall be made to protect it from freezing until it is at least four (4) days old. Care should be taken to protect concrete against fre-zing weather which may occur at night.

Concrete shall not be deposited under water except by consent of the engineer and under his immediate supervision. No permission will be given to deposit concrete in running water and where it is deposited in still water a tremie or chute shall be used.

14. Joints.—Expansion joints to provide for shrinkage and contraction shall be constructed where and as indicated on the plans. Care shall be taken in construction that these joints are so made as to permit a free movement at the joint when the concrete expands or contracts.

Construction of field joints will be permitted when necessary but must be made in such places and in such a manner that they will have the least possible effect on the strength of the structure. Reinforced beams, slabs, girders and other important primary members shall be cast continuously unless field joints are shown in plans. Field joints shall be made with faces at right angles to the direction of stress. No joints shall be made with the concrete sloping to a thin edge. Bulkheads shall be used in constructing all joints, other than horizontal.

When work is suspended and a field joint is to be made, there shall be provision for bonding subsequent work to that already in place by means of projecting reinforcing rods or suitable grooves.

When the placing of concrete is to be recsumed the joint surface of the concrete already in place shall be thoroughly cleaned of dirt and lattance, well wetted, and then flushed with cement grout. Fresh concrete shall then be placed promptly over the joint thus prepared.

[fol. 54] 15. Finish.—Except as otherwise noted on the plans, all surfaces shall have a plain spaded or troweled finish. All surfaces shall be even and free from voids, with no coarse aggregate showing. Tops of floor slabs and arches shall have a uniformly smooth, dense, floated surface. Exposed surfaces shall be more carefully finshed and shall be uniform and of good appearance. Railings, coping, etc., shall be given particular attention, and finished in the manner indicated on the plans.

Forms covering surfaces which require a careful finish, shall be removed as soon as conditions permit and if minor defects are apparent in the finish, the surface may be repaired with cement mortar rubbed on with a wooden float.

Plastered surfaces will not be permitted. Washed, rubbed, or tooled surfaces will not be required unless specified on plans, except where necessary in order to repair plain spaded surfaces that do not conform to the specifications for same.

Concrete Railings

16. Description.—Parapets and railings for Bridges, Wing Walls, Retaining Walls, etc., shall include all work erected above the top of the curb for the protection of traffic.

Materials.—Unless otherwise noted, railings shall be constructed of Class A concrete and the materials shall fulfill the requirements for materials for Class A Concrete, except as may be modified by special clauses or notes on the plans.

Construction Methods.—For "cast in place" railings the forms shall be made of good quality tongued and grooved lumber and be of first class workmanship throughout. They shall be accurately built to the designs and dimensions shown on the planes, and all mouldings, panel work, and bevel strips shall be straight and true with neatly mitered joints. Forms shall be erected to exact line and grade and be so rigidly braced that they will maintain true alignment during the placing of concrete. Each section of the work shall be cast complete to one and one-half (1½) inch below the top of a single operation. The top shall be finshed with one and one-half (1½) inches of mortar, of the same mix as used in the concrete, struck off with a templet moved on guides attached to the forms. This mor- [fol. 55] tar shall be placed within ten (10) minutes after the concrete is deposited. Railings shall be very carefully finished, the forms shall be carefully removed as soon as possible (in not less than 12 nor more than 48 hours) and all porous spots and places damaged in removing the forms repaired and the entire surface rubbed with clean water and a wooden float until all form marks are removed and the surface assumes a uniform sandy appearance.

Precast railings shall be made in accordance with the designs and dimensions shown on the plans or as directed, and shall be erected true to line and grade in a thoroughly workmanlike manner. The members shall be straight and true to form and free from imperfections or damaged places. They shall be set in place in full beds of 1 to 3 mortar, and shall be thoroughly bonded together as shown on the plans as directed.

17. Pipes and Conduits.—Pipes and conduits which are to be encased in the concrete as shown on the plans, shall be placed by the Contractor during construction. They will be delivered to the Contractor, unless otherwise stated, at the site of the structure. No compensation will be made for placing them except that no deductions will be made for the volume occupied.

18. Drainage and Weep Holes.—Drainage and weep holes shall be constructed in the manner and where indicated on the plans, or directed, and no additional allowance will be made for such work, except that no deduction will be made for such openings in payment for concrete.

19. Defective Work.—Any defective work discovered after the forms have been removed, shall be removed immediately and renewed. If the surface of the concrete is bulged, uneven, or shows excess honey-combing or form joint marks, which, in the opinion of the engineer, cannot be repaired satisfactorily, the entire section shall be removed and renewed. No compensation will be allowed for the work described above.

20. Measurements of Concrete.—All concrete shall be classified as shown on the plans unless changes are ordered during construction. All plain concrete in piers, abutments and wings and other walls shall be measured in accordance with the dimensions shown on the plans, unless changes are ordered during construction, except that no deductions shall be made for paneling in this class of work. All rein- [fol. 56] forced concrete, such as beams and girders, spandrel walls, water tables, parapets, coping, etc., shall be measured as described above for plain concrete and if panelling is not more than six (6) inches in width, no deductions will be made. In hand railing, if the rail is of an open type, that is, alternate solid and open spaces, it will be measured as if no openings existed.

21. Basis of Payment.—The bid prices per cubic yard, for the various classes of concrete, will be payment in full, for all concrete materials, forms, labor and incidental expenses entering into concrete construction, and will also include the placing of all pipes, conduits, anchors, bolts, grillages, and other similar materials; except that wher-

ever reinforcing steel is called for on the plans, it will be paid for separately from the concrete, as provided below. The use of reinforcing steel, however, will not serve to change the rate of payment for the various classes of concrete in which the steel may be used. No additional allowance will be made for coffer-dams, pumping or bailing, or for any material or labor on account of water.

22. Loads and Stresses.—For concrete and reinforced concrete highway bridges the loads shall be assumed as given in the specifications for Steel Highway Bridges of the Wyoming State Highway Department.

23. Calculations.—Calculations shall be made with reference to working stresses and safe loads, rather than with reference to ultimate strength and ultimate loads.

Initial stress in reinforcement due to contraction or expansion shall be neglected.

24. Unit Stresses.—All parts of the reinforced concrete structure shall be so proportioned that the sum of the maximum stress from all causes shall not exceed for 1;2;4 concrete the following value in pounds per square inch:

Axial Tension	None
Bearing (surface of twice the loaded area)	650
Axial Compression (plain column pier)	450
Columns with longitudinal reinforcement and with hoops	650
Compression on Extreme fiber	650
Shear (without web reinforcement)	40
(Thoroughly reinforced with web reinforcement)	120
Bond (concrete and plain rods)	80
(Concrete and drawn wire)	40
(Concrete and deformed bars)	100

[fol. 57] The tensile or compressive stress in steel shall not exceed 16,000 pounds per square inch.

For other mixtures than 1;2;4 the above unit stresses for concrete shall be reduced by the following percentages:

For 1;2½;5 concrete	20%
For 1;3;6 concrete	30%

The ratio of the modulus of elasticity of steel to the modulus of elasticity of concrete shall be taken at 15.

In calculating the items in concrete the extreme area of steel shall be equivalent to 15 times its area of concrete.

Concrete Piling

Concrete Piling:

Description.—Piling shall consist of concrete piles made of the dimensions and placed in the location and to the elevation shown on the plans or as directed and in conformity with these specifications.

The contractor shall be responsible for determining the length of piles required, by driving test piles, or otherwise under the requirements herein provided.

Testing.—If tests are called for in the contract, the contractor shall submit a price per test for testing piles. The number of tests to be determined by the Engineer. Tests shall be made by loading the pile to two times the working load without exceeding a permanent settlement of one-quarter inch in 48 hours unless otherwise specified. In case the safe carrying capacity of any pile is found by test, or by formula if not tested to be less than the load for which it was designed, additional piles shall be driven until the load per pile to be borne is reduced to the safe carrying capacity.

Excavation.—All excavations of the foundation in which piles are to be driven shall be completed before driving is commenced. After driving is completed all loose and displaced materials shall be removed from around the piles, leaving a clean, solid surface to receive the concrete. Piles shall be constructed in accordance with the designs shown on the plan, or if not shown on the plan designs shall be submitted for approval.

Concrete piles shall be made of Class "A" Concrete as specified in Paragraph 94, except that the concrete shall be waterproofed by an approved method.

[fol. 58] Precast Piles.—These shall be made in accordance with the plans, and the reinforcement shall be accurately placed and rigidly secured in such manner as to insure its proper location in the completed pile. The con-

tract shall be carefully placed, tamped and spaded, care being used to fill every part of the form and to work the concrete around and under the reinforcement without displacing it. The piles shall be cast separately, or if alternate piles are cast in a tier, the intermediate piles shall not be poured until four (4) days after the pouring of the adjacent piles. Piles cast in tiers shall be separated by tar paper carefully placed. The concrete shall be poured continuously in each pile. The completed piles must be free from stone pockets, porous spots, or other defects, and be straight and true to the form specified. The forms shall be true to line, built of surfaced lumber, and a one (1) inch chamfer strip shall be used in all corners; they shall be water tight, and shall not be removed within twenty-four (24) hours after the concrete is poured.

All exposed surfaces of the piles shall be given a rubbed finish. The piles shall be cured at least 40 days at a temperature of not less than 40 degrees F., or 30 days at a temperature of not less than 60 degrees F. Piles shall be at least 30 days old when driven. Great care shall be taken that green piles are not injured while curing by improperly supporting, handling, or transporting them.

Driving.—Requirements for driving large concrete piles will be covered by special specificatons. Under usual conditions, that is, piles containing not over two cubic yards of concrete, they shall be driven with drop hammers weighing not less than the pile, or with double acting steam hammers, the total weight of which is not less than two-thirds the weight of the pile. In driving, the tops of the piles shall be protected by suitable cushions of wood, rope, or material so as to reduce the injury of the pile to a minimum. Metal shoes or points of an approved design shall be furnished when ordered by the Engineer. Piles shall be driven to rock until the safe bearing capacity of each pile, as determine*g* by the following formulas, shall equal the loading per mile specified on the plan:

$$P = \frac{2\ W.\ H}{S \times 0.1}$$ for gravity hammers.

$$P = \frac{2\ W\ H}{S \times 0.1}$$ for steam hammers.

[fol. 59] P—Load in pounds.
W—Weight of the falling hammer in pounds.
H—Height of fall in feet.
S—Average penetration in inches by the last three blows.

In case the above result cannot be obtained without injury to the pile or on account of the impracticable lengths required the number indicated on the plans shall be increased until the maximum load coming on any pile shall not exceed its safe carrying capacity as determined by the above formulas. For movable spans, arches, and high abutments the above carrying capacity shall be reduced 20%.

Jetted Piles.—Jetted piles shall extend to a good solid stratum. Their carrying capacity shall be determined by actual tests, or if driven with the aid of a jet and for the last five blows of the hammer, driven without any jet, the same formula may be applied as in the case of driven piles. If jet pipes are embodied in concrete piles they shall be filled with cement grout 1;2 mix.

Piles Cast in Place.—When piles are cast in a strong metal shell, which is previously driven to refusal and which remains in place after the concrete has set, the safe loads when piles are completely embedded in firm earth may be taken the same as specified above for driven reinforced concrete piles.

Piles cast in place without metal reinforcement shall not be used in water or in ground so soft, in either wet or dry condition as not to give firm lateral support. No pile of this type shall be concreted until all driving within a radius of six feet has been completed, and care shall be taken that the piles are in no way disturbed until the concrete has become hard.

Basis of Payment.—This work will be paid for at the contract unit price per linear foot for concrete piles complete in place, which price will include all materials, equipment, tools, labor and work incidental thereto. Payment will be made for the actual number of feet of piles left in place and no allowance will be made for any piles which are not driven in accordance with the specifications, or as ordered by the Engineer and acceptable to him.

Special Notice to Contractors

Contractor will be allowed on monthly estimates payment for iron, steel, cement and piling furnished, provided the same are stored so as to prevent damage from exposure to [fol. 60] the elements or from any other cause, and provided also that contractor furnishes a receipted invoice for such material. Payment shall be based upon unit prices determined by the Engineer.

Employment of Labor

"In the employment of labor, in the performance of this contract, preference shall be given, other conditions being equal, to honorably discharged soldiers, sailors, and marines, but no other preferences or discriminations among citizens of the United States shall be made. (Section 6, of the Act of Congress approved February 28, 1919, entitled 'An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes'—Public No. 299, 65th Congress.)"

The entire project has been divided into Sections B. C. and D. as shown on the plans and bids may be submitted for any or all sections. Comparison of bids will be made by sections and the right is reserved to award the contract to the lowest bidder on each section.

Special Notice to Contractors

Workingman's Compensation

1. The Workingmen's Compensation Law (Chapter 124 Session Laws 1915) provides compensation for injuries or death resulting from injuries, of workmen from accident occurring in extra hazardous employment.

2. If you do not have a copy of this law take — up with the Engineer in charge or the State Treasurer who will see you are provided with same.

3. Section 23 of this act makes the State Highway Superintendent responsible to the extent of seeing that Contractors make monthly payment to the Compensation Fund.

4. Report on Pay Roll Form accompanied by check or draft payable to State Treasurer should be made for extra hazardous occupation on each project. Same to be sent to the District Engineer in whose district you have contract, on or before the fifteenth of each month following that for which report is made. Payment will be transmitted to State Treasurer through this office.

5. Employer's Report of accident must be filed within twenty days after accident. Employees are entitled to file their report of all injuries received while in your employ. [fol. 61] Such should be explained to the workmen as it increases their efficiency.

6. For convenience all Dist. Engineers have complete supply of forms such as Pay Roll and Injury Reports.

7. All payments and reports to Workingmen's Compensation must be rendered before final estimates can be paid.

Fed. Aid No. 118, Sec. "B"

State No. —

Proposal to the State Highway Commission of Wyoming for the construction of grading and culvert construction on 1.95 miles of the Wind River Canyon (Section B) Road in Fremont and Hot Springs County, as shown on drawings and plans or file

GENTLEMEN: The undersigned, as bidder, hereby certified that — ha- examined the location of the proposed work, and the plans, specifications and contract governing the same, that this bid is made without connection with any person, persons or corporation making any other bid for the same purpose, and is in all respects fair and without collusion or fraud; and hereby proposed — to furnish all labor, tools, materials, supplies, etc. and to sustain all expense necessary to complete the work embraced in this improvement, or as much thereof as can be completed with the money available, in accordance with the said plans, specifications and contract and the following schedule of approximate quantities, rates and prices, to-wit;

Item No.	Approximate quantity	Items with unit bid price written in words	Unit bid price, Dollars, Cents	Amt. bid, $ C.
1	2,210	Backfill in rock cuts Cubic yds. at Thirty-five cents per backfill rock cut	.35	
4	300	Cubic yards station overhaul on roadbed excavation at .16 per cubic yard station	.16	
[fol. 62]				
19	604	Lineal feet, furnishing in place including excavation and backfilling, 15-inch corrugated iron culvert pipe at 1.65 per lineal foot	1.65	
20	134	Lineal feet, furnishing in place including excavation and backfilling, 18-inch corrugated iron culvert pipe at 2.00 per lineal foot	2.00	
23	140	Lineal feet, furnishing in place including excavation and backfilling, 36-inch corrugated iron culvert pipe at 3.75 per lineal foot	3.75	
24	1,660	Cubic yards dry rubble masonry, complete in place at 4.50 per cubic yard	4.50	
40	32	Cubic yards Class B concrete in culvert pipe end walls including excavation and backfill at Twenty-five dollars per cubic yard	25.00	
41	58,300	Cu. Yd. Excavation unclassified at 1.50 per cu. yd	1.50	
44	372	Lin. Ft. Tunnel Exc. at 70.00 per Lin. Ft	70.00	
45	50,000	Cu. Yd. Station Overhaul on backfill in rock cuts at two cents per C. Y	.02	
		Total, $124,371.10.		

The bidder also proposes to perform all extra work on the basis set forth in the speculations on Page 7, under the heading "Additional Work."

The bidder agrees that the quantities for each item, as furnished by the State Highway Engineer, are approxi-
[fol. 63] mate only and subject to increase or decrease, and that he is willing to perform any increased or decreased quantities of work at prices bid per unit. Accompanying this proposal is a Certified Check for — Dollars ($ —) payable to the State Highway Commission of Wyoming, this amount being five per cent 5% of the total bid based upon the approximate estimate of quantities at the above price.

The bidder furthermore agrees in case he should default in executing such contract and bond, within ten days after the acceptance of this bid, that the check accompanying this

bid and the money payable thereon shall become the property of the State of Wyoming as liquidated damages and the said Board may proceed to award the contract to others.

The bidder also agrees to commence work within fifteen days after the execution of said contract and bond, and to complete all of said work on or before the first day of January, 1923.

(Signature of bidder:) Utah Construction Company, by A. H. Christensen, Supt. Business address, Ogden, Utah.

Date: June 1, 1922.

Fed. Aid No. 118-C

State No. —

Proposal to the State Highway Commission of Wyoming for the construction of grading and culvert construction on 9.47 miles of the Wind River Canyon Road, Section "C," in Fremont and Hot Springs County, as shown on drawings and plans or file

GENTLEMEN: The undersigned, as bidder, hereby certifies that — ha- examined the location of the proposed work, and the plans, specifications and contract governing the same, that this bid is made, without connection with any person, persons or corporation making any other bid for the same purpose, and is in all respects fair and without collusion or fraud; and hereby propose- to furnish all labor, tools, materials, supplies, etc., and to sustain all expense [fol. 64] necessary to complete the work embraced in this improvement, or as much thereof as can be completed with the money available, in accordance with the said plans, specifications and contract and the following schedule of approximate quantities, rates and prices, to-wit:

Item No.	Approximate quantity	Items with unit bid price written in words	Unit bid price Dollars, Cents	Amt. b'd. $ c.
1	10,790	Backfill in rock cuts at .35 per cubic yard	.35	
4	400	Cubic yards station overhaul on roadbed excavation at .16 per cubic yard station	.16	
19	1,452	Lineal feet, furnishing in place including excavation and backfilling, 15-inch corrugated iron culvert pipe at 1.65 per lineal foot	1.65	
20	60	Lineal feet, furnishing in place including excavation and backfilling, 18-inch corrugated iron culvert pipe at 2.00 per lineal foot	2.00	
21	100	Lineal feet, furnishing in place including excavation and backfilling — 24-inch corrugated iron culvert pipe at 2.70 per lineal foot	2.70	
22	36	Lineal feet, furnishing in place including excavation and backfilling, 30-inch corrugated iron culvert pipe at 3.00 per lineal foot	3.00	
23	750	Lineal feet, furnishing in place including excavation and backfilling, 30-inch corrugated iron culvert pipe at 3.60 per lineal foot	3.60	
[fol. 65]				
24	3,260	Cubic yards dry rubble masonry, complete in place at 2.00 per cubic yard	2.00	
40	145	Cubic yards Class B concrete in culvert pipe end walls including excavation and backfill at 25.00 per cubic yard	25.00	
42	212,300	C. Y. exc. unclassified at .68½ per cu. yd	.68½	
45	108,000	Cu. Yd. Station overhaul on backfill in rock cuts at .02 per cu. yd	.02	
		165,004.80		

The bidder also proposes to perform all extra work on the basis set forth in the specifications on Page 7, under the heading "Additional Work."

The bidder agrees that the quantities for each item, as furnished by the State Highway Engineer, are approximate only and subject to increase or decrease, and that he is willing to perform any increased or decreased quantities of work at prices bid per unit. Accompanying this proposal is a Certified Check for — Dollars ($—) payable to the State Highway Commission of Wyoming, this amount

being five per cent (5%) of the total bid based upon the approximate estimate of quantities at the above price.

The bidder furthermore agrees in case he should default in executing such contract and bond, within ten days after the acceptance of this bid, that the check accompanying this bid and the money payable thereon shall become the property of the State of Wyoming as liquidated damages and the said Board may proceed to award the contract to others.

The bidder also agrees to commence work within fifteen days after the execution of said contract and bond, and to complete all of said work on or before the first day of January, 1923.

(Signature of bidder:) Utah Construction Company, by A. H. Christensen, Supt. Business address, Ogden, Utah.

[fol. 66] Date: June 1, 1922.

Fed. Aid No. 118-B

State No. —

Proposal to the State Highway Commission of Wyoming for the construction of grading and culvert construction on 2.0 miles of the Wind River Canyon Road (Section "D") in Fremont and Hot Springs County, as shown on drawings and plans or file

GENTLEMEN: The undersigned, as bidder, hereby certified that — ha- examined the location of the proposed work, and the plans, specifications and contract governing the same, that this bid is made without connection with any person, persons or corporation making any other bid for the same purpose, and is in all respects fair and without collusion or fraud; and hereby propose- to furnish all labor, tools, materials, supplies, etc., and to sustain all expense necessary to complete the work embraced in this improvement, or as much thereof as can be completed with the money advailable, in accordance with the said plans, specifications and contract and the following schedule of approximate quantities, rates and prices, to-wit:

Item No.	Approximate quantity	Items with unit bid price written in words	Unit bid price Dollars, Cents	Amt. bid, $ C.
4	300	Cubic yards station overhaul on roadbed excavation at five cents per cubic yard station..	.05	
7	50	Cu. Yds. dry excavation for structures except pipe culverts and head walls One Dollar		
[fol. 67]		25/100 per cubic yard.....	1.25	
8	20	Cu. Yds. "Class A" concrete as per plans, complete in place at Twenty-five dollars per cubic yard.....	25.00	
19	104	Lineal feet, furnishing in place including excavation and backfilling, 15 inch corrugated iron culvert pipe at one dollar and 65/100 per lineal foot....	1.65	
20	28	Lineal feet, furnishing in place including excavation and backfilling 18 inch corrguated iron culvert pipe at one dollar and 90/100 per lineal foot....	1.90	
23	26	Lineal feet, furnishing in lace including excavation and backfilling, 36 inch corrugated iron culvert pipe at Three dollars 60/100 per lineal foot.....	3.60	
24	80	Cubic yards dry rubble masonry, complete in place at Four Dollars per cubic yard.....	4.00	
27	2,600	Pounds of deformed steel bars for reinforcement as per plan, including clips, wires, etc. at Seven cents per pound.....	.07	
37	20	Cubic yards wet excavation for structures at Seven dollars per cubic yard.....	7.00	
40	11	Cubic yards Class B. concrete in culvert pipe end walls including excavation and backfill at Twenty-five dollars per cubic yard.....	25.00	
43	16,300	Cu. yd. Excavation unclassified at .18 per cu. yd.....	.17	
		Total $4,971.96		

[fol. 68] The bidder also proposes to perform all extra work on the basis set forth in the specifications on Page 7, under the heading "Additional Work."

The bidder agrees that the quantities for each item, as furnished by the State Highway Engineer, are approximate only and subject to increase or decrease, and that he is willing to perform any increased or decreased quantities of work at prices bid per unit. Accompanying this proposal is a Certified Check for Eighteen Thousand five hundred ($18,500.00) Dollars payable to the State Highway

Commission of Wyoming this amount being five per cent of the total bid based upon the approximate estimate of quantities at the above price.

The bidder furthermore agrees in case he should default in executing such contract and bond, within ten days after the acceptance of this bid, that the check accompanying this bid and the money payable thereon shall become the property of the State of Wyoming as liquidated damages and the said Board may proceed to award the contract to others.

The bidder also agrees to commence work within 15 days after the execution of said contract and bond, and to complete all of said work on or before the first day of January, 1923.

(Signature of bidder:) Utah Construction Company, by A. H. Christensen, Supt. Business address: Ogden, Utah.

Date: June 1, 1922.

Fed. Aid No. 118

State No. —

Contract

This Agreement, made and entered into this 1st day of June, 1922 between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the state of Utah, hereinafter called the Contractor,

Witnesseth: That for and in consideration of the payments, covenants and agreements hereinafter mentioned to be made and performed by the parties hereto, the said parties hereby covenant and agree as follows:

[fol. 69] I. The Contractor, at his own proper cost and expense shall do all work and furnish all labor, materials, tools, except such as are mentioned in the specifications to be furnished by the State of Wyoming, necessary to construct in a good, wokmanlike and substantial manner and to the satisfaction of the State Highway Engineer a portion of the Wind River Canyon Road State Highway in the Counties of Fremont and Hot Springs of Wyoming from

Boysen Dam to Bridge South of Thermopolis, under the direct supervision of the State Highway Commission, subject to inspection at all times and approval by the Secretary of Agriculture pursuant to the provisions of the Act of Congress approved July 11, 1916 (39 U. S. Statutes at Large, page 335) entitled "An Act to Provide that the United States shall aid the States in the Construction of rural post roads, and for other Purposes," and in full compliance with the attached plans and specifications, which are made a part hereof, and with the terms of this agreement and the requirements of the Engineer under it.

II. In consideration of the covenants and agreements to be kept and performed by the Contractor and for the faithful performance of this contract and the completion of the work embraced therein according to the plans, specifications and conditions herein contained and referred to, the State of Wyoming, shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract and also for all loss or damage arising out of the nature of the work, the action of the elements or from any unforseen contingencies or difficulties encountered in the prosecution of the work, the prices stipulated in the proposal.

III. Time shall be of the essence of this contract on the part of the Contractor and it is hereby agreed by the parties hereto that in case all of the work called for under said contract, in all parts and requirements, is not completed by and at the time herein mentioned or by and at such other time to which the period of completion may be extended, damage will be sustained by the State of Wyoming, and that it is and will be difficult or impossible to ascertain and determine the actual damage which the State will sustain in the event of and by reason of such delay; and it is therefore agreed that said Contractor shall pay to the State of Wyoming, as liquidated damages and not as penalty, an amount equal to the cost of maintaining the necessary force of engineers and inspectors on the work during the additional time, which said amount is hereby agreed upon as the damage that will [fol. 70] be suffered by the State of Wyoming by such failure to complete the work within the time named; and the State Highway Commission may deduct the same from the

amount due or to become due to the Contractor and such payments or deductions shall not in any degree release the Contractor from the further obligations and penalties in respect to the fulfilment of the entire contract, nor any right which the State may have to claim, sue for and recover compensation and damages for non-performance of this contract. No charge will be made by the Contractor for hindrances or delays from any cause whatsoever in the progress of the work but such hindrances or delays may be held as sufficient reason for an extension of the time allowed for the completion of the work.

IV. Said work shall be commenced on or before the 1st day of July, 1922, and shall be completed on or before the 1st day of April, 1925, Provided, however, that should the Contractor be delayed in the prosecution of completion of the work by any act, neglect, or fault of the Commission or by any damage caused by fire, flood or other casualty or by any other cause over which the Contractor has no control, then the time herein set for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, which extended period shall be determined and fixed by the State Highway Engineer, but no such allowance shall be made unless a claim therefor is presented in writing to the State Highway Engineer within ten (10) days after the occurrence of such delay. All requests for an extension of time must be accompanied by an agreement of the surety on the bond of the Contractor to such extension. The State of Wyoming hereby reserves the right to accept and make use of any portion of said work before the completion of the entire work without invalidating the contract, or binding itself to accept the remainder of the work or any portion thereof whether completed or not.

V. Monthly payments based upon approximate estimate of the amount of and value to the State of expense incurred during the preceding month, as computed by the Engineer, shall be made to the contractor during the progress of the work on or before the 15th day of each calendar month. Provided, that fifteen per cent of the amount of the estimated value of the work done shall be retained until the work is fully completed and accepted by the Engineer. These payments shall not be considered as an acceptance on

[fol. 71] the part of the Engineer of any part of the work done or materials furnished, but simply as a payment on account.

Within a reasonable time after the acceptance of the work according to the contract, the State Highway Engineer shall certify to the Commission a final estimate based upon the quantities measured by the Engineer and computed according to the unit prices hereto attached, showing the total work done or required and the amount due the Contractor therefor. After deducting therefrom all previous payments and any other amounts to be kept and retained under the provisions of this contract, payment in full shall be made to the Contractor; Provided, that before making of such final payment the State Highway Commission may require the Contractor to show to its satisfaction that all just debts due all laborers, mechanics, material, men and persons who have supplied Contractor, or sub-contractor, with materials or goods of any kind for this work, have been paid. All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

VI. And it is also understood and agreed that the advertisement, proposal, bond, specifications and plans, as hereto attached or herein referred to, are all essential documents to this contract and are a part hereof.

VII. And the Contractor further agrees to comply with the provisions of the law known as the Workman's Compensation Act of the State of Wyoming.

(Slip attached:) Notice of Completion.—A notice of completition of all work contracted for shall be given by the contractor ninety (90) days before the final estimate shall be paid to the contractor.

In witness whereof the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part, has caused these presents to be executed and

has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922.

State Highway Commission of Wyoming, by (Sgd.) L. E. Laird, Superintendent. (Seal.) Attest: [fol. 72] (Sgd.) Z. E. Sevison, Secretary. The Utah Construction Company, by (Sgd.) W. H. Wattis, President. (Seal.) Attest: (Sgd.) Warren L. Wattis, Secretary.

EXHIBIT B TO AMENDED PETITION

Supplemental Agreement

Supplementing the contract entered into the 1st day of June, 1922, between the State Highway Commission of Wyoming, and The Utah Construction Company for the construction of the Wind River Canyon road in Fremont and Hot Springs Counties, being Sections B, C and D of Federal Aid Project No. 118, the following facts and conditions are hereby mutually agreed to:

Recitals

In the final location and staking out of Sections B and C, it was found desirable and advantageous to make certain changes in grades and alignments from those shown on the original plans, which changes had been anticipated by both parties, at the time of executing the contract, but the quantities involved were unknown at that time.

It has been found desirable to substitute cement rubble masonry head walls in lieu of concrete headwalls as called for in the contract. The amount of tunnel excavation has been increased to approximately 882 lineal feet, the amount in the original contract being 372 lineal feet. The original contract provides for the use of excavated material from cuts in making fills and the washing of excess material from cuts in the widening of fills in such manner as the engineer may direct. On account of increased quantities of excavation the contract cannot be completed April 1, 1923.

Agreement

Now, therefore, it is mutually agreed by and between the parties hereto as follows:

1. The Utah Construction Company agrees to an increased quantity of unclassified excavation on Section B of [fol. 73] approximately 30,000 cubic yards, and to perform the same at the contract price called for in the original contract.

2. The Utah Construction Company agrees to an increased quantity of unclassified excavation on Section C of approximately 100,000 cubic yards, and to perform the same at the unit price called for in the original contract.

3. The Utah Construction Company agrees to construct cement rubble masonry headwalls at a unit price of $14.00 per cubic yard as covered by letter of November 4, 1922.

4. The Utah Construction Company agrees to complete the increased amount of tunnel excavation at the contract unit price of $70.00 per lineal foot, as covered by letter of July 26, 1922.

5. The State Highway Commission agrees to allow the contractor to waste material from cuts and borrow material outside of the staked cross-sections for fills in order to permit the use of steam shovels for rough grading, provided, however, the basis of payment shall be the excavation quantities determined by the cross section stakes and that borrow outside of the staked slopes is at the contractor's expense, unless such excavated area is used on completed roadway at the time of final acceptance.

It is expected that the contractor will make use of material from cuts to complete the fills so far as possible without being required to obtain special equipment for the purpose, provided, however, that material from cuts shall be used in making fills where most economical to do so.

6. Material excavated by the contractor in sections where the slopes are staked by the engineer will not stand shall be paid for at the unit price and the quantities determined by recross-sectioning the work involved.

7. The State Highway Commission agrees to an extension of time to June 1, 1923.

State Highway Commission of Wyoming. (Signed) L. E. Laird, Superintendent. Attest: (Signed) Z. E. Sevison, Secretary. The Utah Construction Company, by (Signed) A. H. Christensen, Super-
[fol. 74] intendent. Attest: (Signed) Warren L. Wattis, Secretary.

Approved: (Signed) W. H. Wattis, President.

EXHIBIT C TO AMENDED PETITION

Section B

1. Excess quantity excavation over final estimate, due to natural sloughing outside slope stakes because of improper staking, 21,608 cu. yds. solid rock at $2.10 per cu. yd.	$45,376.80
2. Excess cost of construction due to changing from a borrow job to an excess cut job, 104,-135 cu. yds. at 60¢ per cu. yd.	62,481.00
3. Hand sorted rock surfacing, under written instruction of engineer, 23,014 cu. yds. at $2.50 per cu. yd.	5,785.00
Total	$113,642.80

Section C

1. Embankment, extra cost of excavation due to changing from a borrow job to an excess cut job, 140,925 cu. yds. at 68½¢ per cu. yd.	$96,533.62
2. Embankment, raising of grade by order of engineer, 9,987 c. yds. at 68½¢ per cu. yd.	6,841.09
3. Excavation, cost of raising of grade by order of engineer, 9,987 cu. yds. at 68½¢ per cu. yd.	6,841.09
4. Excavation, solid rock, 112,784 cu. yds. in excess of solid rock excavation required by Drummond line, at $1.65 less 68½¢ per cu. yd. allowed	108,837.43

5. Hand pick rock surfacing, under order of engineer, 13,602 cu. yds. at $2.50 per cu. yd. less $4,760.70 allowed on the same as backfill	29,244.30
6. Experimenting in slopes on engineer's order (quantities not available) reasonable cost	60,000.00
7. Extra excavation outside of cross section stakes caused by improper staking, 49,801 cu. yds. at 68½¢ per cu. yd.	34,113.60
Total	$342,411.13

IN UNITED STATES DISTRICT COURT

DEMURRER TO AMENDED PETITION—Filed August 26, 1925

I

Comes now the defendant The State Highway Commission of Wyoming and demurs to the second amended petition of the plaintiff filed herein and to both causes of action [fol. 75] therein alleged on the ground and for the reason that said second amended petition shows on its face that both causes of action therein alleged are actions against the State of Wyoming by the plaintiff, which is a non-resident of the State of Wyoming and which is a citizen and resident of the State of Utah, and that therefore this court has no jurisdiction of the subject or subjects of the action alleged in said second amended petition, and because the court has no jurisdiction to entertain this action against the State of Wyoming.

II

Comes now said defendant the State Highway Commission of Wyoming and demurs to the first cause of action alleged and set forth in plaintiff's second amended petition on the ground and for the reason that said first cause of action does not state facts sufficient to constitute a cause of action.

David J. Howell, Attorney General of Wyoming, C. L. Rigdon, Ray E. Lee, Special Assistant Attorney General of Wyoming, Attorneys for Defendants.

In United States District Court

Order Overruling Demurrer to Amended Petition—Filed Oct. 16, 1925

The motion of the defendant to strike certain portions of the second cause of action of the second amended petition herein having been heretofore argued and submitted, and the court being fully advised in the premises, said motion hereby is denied, to which ruling of the court the defendant objects and excepts.

The special demurrer of the defendant to the second amended petition herein having been heretofore argued and submitted, and the court being fully advised in the premises, it is ordered that said demurrer be and the same hereby is overruled, to which order and ruling of the court the defendant objects and excepts.

The demurrer of the defendant to the first cause of action of plaintiff's second amended petition herein having been heretofore argued and submitted, and the court fully advised in the premises, it is ordered that said demurrer be [fol. 76] and the same hereby is overruled, to which order and ruling of the court the defendant objects and excepts.

It is further ordered that said defendant have 30 days from and after this date in which to plead to said petition and plaintiff 15 days after service of copy of answer upon it to reply.

Dated this 16th day of October, A. D. 1925.

T. Blake Kennedy, Judge.

In United States District Court

Answer—Filed November 14, 1925

Comes now the above named defendant, The State Highway Commission of Wyoming, and for its answer to the first cause of action, as alleged and set forth in the second amended petition of plaintiff filed herein.

1. Admits that the matter and amount in controversy in this action, exclusive of interest and costs, exceeds the sum and value of Three Thousand Dollars.

2. Admits that prior to June 1st, 1922, one Goyne Drummond, acting for and in behalf of this defendant, made a preliminary survey of a certain proposed road and public highway along the course of the Wind River in Wind River Canyon in Fremont and Hot Springs Counties, Wyoming, but defendant denies that the said survey of said proposed road so made by the said Goyne Drummond, or that any plans, cross-section drawings or notes for the construction of a road through said Wind River Ca-yon, based upon said Drummond survey were ever approved or adopted by this defendant.

3. Admits that on or about the month of May, 1922, this defendant gave public notice for proposals to construct a road and highway through said Wind River Canyon, but denies that said notice for proposals stated that said road was to be constructed according to the plans of the Drummond survey, and denies that said road was to be so constructed.

4. Admits that plaintiff on or about June 1, 1922, made its written proposal in writing to construct said proposed road referred to in said published notice, and that said proposal was accepted by this defendant.

[fol. 77] 5. Denies that on or about the 3rd day of June, 1922, plaintiff made and entered into a written contract with said State Highway Commission but alleges that on or about that date, plaintiff made and entered into a contract with the State of Wyoming, by which it was agreed by and between the parties thereto that the plaintiff should construct such portions of said Wind River Canyon Road as were covered by said contract, in compliance with the specifications attached to said contract, but denies that the plans under which said road was to be constructed, were the so-called Drummond plans, and alleges the fact to be that it was understood and agreed by and between plaintiff and said State of Wyoming prior to the proposal of plaintiff and prior to the execution of said agreement, that said road should be constructed in accordance with a certain revised survey theretofore begun and then being made by the State Highway Engineer; that it was understood and agreed by and between the plaintiff and said State of Wyoming, that the road as located in the so-called Drummond plans as to

Section D would be constructed in accordance with the so-called Drummond plans, but that said road as to Sections B and C thereof would be constructed in accordance with said revised survey and plans then being made. Defendant further alleges that the differences in location of the road as shown in the Drummond plans and the location of the road as provided in said new revised survey, were fully explained to plaintiff and that plaintiff was fully advised in all particulars of the differences in location between the two surveys and that no detailed plans for the construction of said proposed road were yet available at the time of making said proposal and bid and at the time of the execution and signing of said alleged contract, and plaintiff agreed at the time of making said proposals and at the time of the execution and delivery of said alleged contract to construct said road as to Sections B and C thereof according to the plans of the revised survey, which was then being made.

6. Defendant admits that said contract provided for the payment of unit prices for the work to be done thereunder in accordance with the prices named in the proposals of the plaintiff, and that said prices were as alleged and set forth in the sixth paragraph of plaintiff's first cause of action.

7. Defendant admits that on or about the 12th day of December, 1922, the plaintiff and defendant entered into a supplemental agreement, and that a true copy of said supple-[fol. 78] mental agreement is annexed to plaintiff's petition and marked "Exhibit B." Defendant denies that said supplemental agreement was for the purpose of effecting any changes as originally shown on the so-called Drummond plans, but on the contrary defendant alleges that all extra excavation as called for the projected changes in the so-called Drummond survey was included in the estimates in the proposals submitted by the plaintiff before the execution of the original contract of June 1st, 1922, with the State of Wyoming, and that this fact was well known to the plaintiff and its agents prior to the execution of said agreement and also prior to the execution of said supplemental agreement. And in this connection, defendant alleges that at the time of the execution of said supplemental agreement, the plaintiff was fully informed that the said road was to be

constructed and was then being constructed according to the revised survey that had been made and completed prior thereto, and that the extra excavation and tunnelling called for and agreed to be performed by the plaintiff under said supplemental agreement was extra excavation and tunnelling as called for by said new survey and the plans made in accordance therewith.

8. Defendant admits that during the year 1922, the defendant caused a revised survey to be made by Corwine and Olson, engineers in the employ of defendant, and in this connection defendant alleges the facts to be that said survey was in great part completed on or before the first day of June, 1922, and before any construction work was done or performed by plaintiff; that no work was ever done by the plaintiff on the line of the Drummond survey in said Sections B and C, or either of them.

9. Defendant denies that the plans and specifications for the Corwine-Olson survey as given to the plaintiff did not show on their face that they represented a substantial departure from the original survey, but on the contrary, this defendant alleges that said new plans and specifications plainly showed on the face thereof, that said new plans were entirely different and called for an entirely different road to be constructed from that as shown on the Drummond survey; and that plaintiff long prior to the time that these plans were handed to it, knew that said road was to be constructed and was then being constructed on an entirely different line from the Drummond survey, and upon said revised, or so-called Corwine-Olson survey.

[fol. 79] 10. Defendant denies that the so-called change in plans made the operation of excavating and building the said highway more difficult or more expensive, or that it changed the nature of the material to be handled, or that it changed the engineering features, or that plaintiff in building said road according to said change of plans, was required to go to far greater expense, or any greater expense, than was contemplated when said alleged contracts were executed, and defendant further alleges that if said work was more expensive than contemplated by plaintiff, yet, with full knowledge of all facts, plaintiff agreed to make said excavation at the unit prices stated in its pro-

posals and cannot now be heard to complain in regard thereto.

11. Defendant denies that the plaintiff performed any other, extra, or different work from that agreed upon by it to be done or performed; denies that by reason of the matters alleged in plaintiff's petition, or that by reason of any default, negligence, deceit, or other act or acts on the part of this defendant, plaintiff has been damaged in the sum of $456,053.93, or in any other sum or sums whatsoever.

12. Defendant specifically denies each and every allegation in plaintiff's said first cause of action contained, which is not hereinbefore specifically admitted or denied, with the same force and effect as if each and every of said allegations were hereinbefore specifically denied.

II

And further answering the first cause of action as alleged and set forth in the second amended petition of plaintiff filed herein, defendant says:

That the State of Wyoming on the 1st day of June, 1922, entered into a written contract with the plaintiff for the construction of a portion of the Wind River Canyon Road State Highway, in the counties of Fremont and Hot Springs, Wyoming, and that a true copy of said contract is attached to the second amended petition of plaintiff herein;

That on or about the 12th day of December, 1922, plaintiff entered into a supplemental contract modifying the terms of said original contract, and that a true copy of said supplemental contract is attached to plaintiff's said second amended petition.

That at the date of said original contract, to-wit, on the 1st day of June, 1922, a resurvey of said proposed road was being made, but that said resurvey had not at said time been [fol. 80] completed, and an estimate of the quantities of excavation and tunnel work required by said resurvey had not at that time been made; that said resurvey was completed on or about the 15th day of July, 1922, and an estimate of the additional quantities of excavation and tunnel work made; that the final plans and estimates of said resurvey necessitated additional excavation over and above

the amount estimated at the time of the execution of said original contract herein mentioned, and required the construction of additional tunnels, and that it was thereupon agreed by and between said State of Wyoming and said plaintiff that said highway should be constructed in accordance with said resurvey, and that said supplemental contract hereinabove referred to was made and executed for the purpose of carrying into effect said agreement.

III

And for its answer to the second cause of action, as alleged and set forth in the second amended petition of the plaintiff filed herein:

1. Defendant admits that the matter and amount in controversy in this action, exclusive of interest and costs, exceeds the sum and value of Three Thousand Dollars.

2. Admits that prior to June 1st, 1922, one Goyne Drummond, acting for and in behalf of this defendant, made a preliminary survey of a cer-ain proposed road and public highway along the course of the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming, but defendant denies that the said survey of said proposed road so made by the said Goyne Drummond, or that any plans, cross-section drawings or notes for the construction of a road through said Wind River Canyon, based upon said Drummond survey were ever approved or adopted by this defendant.

3. Admits that on or about the month of May, 1922, this defendant gave public notice for proposals to construct a road and highway through said Wind River Canyon, but denies that said notice for proposals stated that said road was to be constructed according to the plans of the Drummond survey, and denies that said road was to be so constructed.

4. Admits that plaintiff on or about June 1, 1922, made its written proposal in writing to construct said proposed road referred to in said published notice, and that said proposal was accepted by this defendant.

5. Denies that on or about the 3rd day of June, 1922, plaintiff made and entered into a written contract with said

[fol. 81] State Highway Commission but alleges that on or about that date, plaintiff made and entered into a contract with the State of Wyoming, by which it was agreed by and between the parties thereto that the plaintiff should construct such portions of said Wind River Canyon Road as were covered by said contract, in compliance with the specifications attached to said contract, but denies that the plans under which said road was to be constructed, were the so-called Drummond plans, and alleges the fact to be that it was understood and agreed by and between plaintiff and said State of Wyoming prior to the proposal of plaintiff and prior to the execution of said agreement, that said road should be constructed in accordance with a certain revised survey theretofore begun and then being made by the State Highway Engineer; that it was understood and agreed by and between the plaintiff and said State of Wyoming, that the road as located in the so-called Drummond plans as to Section D would be constructed in accordance with the so-called Drummond plans, but that said road as to Sections B and C thereof would be constructed in accordance with said revised survey and plans then being made. Defendant further alleges that the differences in location of the road as shown in the Drummond plans and the location of the road as provided in said revised survey, were fully explained to plaintiff and that plaintiff was fully advised in all particulars of the differences in location between the two surveys and that no detailed plans for the construction of said proposed road were yet available at the time of making said proposal and bid and at the time of the execution and signing of said alleged contract, and plaintiff agreed at the time of making said proposals and at the time of the execution and delivery of said alleged contract to construct said road as to Sections B and C thereof according to the plans of the revised survey, which was then being made.

6. Defendant admits that said contract provided for the payment of unit prices for the work to be done thereunder in accordance with the prices named in the proposals of the plaintiff, and that said prices were as alleged and set forth in the sixth paragraph of plaintiff's second cause of action.

7. Defendant admits that on about the 12th day of December, 1922, the plaintiff and defendant entered into a supplemental agreement, and that a true copy of said supplemental agreement is annexed to plaintiff's petition and marked "Exhibit B." Defendant denies that said supple-
[fol. 82] mental agreement was for the purpose of effecting any changes as originally shown on the so-called Drummond plans, but on the contrary defendant alleges that all extra excavation as called for by the projected changes in the so-called Drummond survey was included in the estimates in the proposals submitted by the plaintiff before the execution of the original contract of June 1st, 1922, with the State of Wyoming, and that this fact was well known to the plaintiff and its agents prior to the execution of said agreement and also prior to the execution of said supplemental agreement. And in this connection, defendant alleges that at the time of the execution of said supplemental agreement, the plaintiff was fully informed that the said road was to be constructed and was then being constructed according to the revised survey that had been made and completed prior thereto, and that the extra excavation and tunnelling called for and agreed to be performed by the plaintiff under said supplemental agreement was extra excavation and tunnelling as called for by said new survey and the plans made in accordance therewith.

8. Defendant admits that during the year 1922, the defendant caused a revised survey to be made by Corwine and Olson, engineers, in the employ of the defendant, and in this connection defendant alleges the facts to be that said survey was in great part completed on or before the first day of June 1922, and before any construction work was done or performed by plaintiff; that no work was ever done by the plaintiff on the line of the Drummond survey in said Sections B and C, or either of them.

9. Defendant denies that the plans and specifications for the Corwine-Olson survey as given to the plaintiff did not show on their face that they represented a substantial departure from the original survey, but on the contrary, this defendant alleges that said new plans and specifications plainly showed on the face thereof, that said new plans were entirely different and called for an entirely different road

to be constructed from that as shown on the Drummond survey; and that plaintiff long prior to the time that these plans were handed to it, knew that said road was to be constructed and was then being constructed on an entirely different line from the Drummond survey, and upon said revised, or so-called Corwine-Olson survey.

10. Defendant denies that the so-called change in plans made the operation of excavating and building the said highway more difficult or more expensive, or that it changed [fol. 83] the nature of the material to be handled, or that it changed the engineering features, or that plaintiff in building said road according to said change of plans, was required to go to far greater expense, or any greater expense, than was contemplated when said alleged contracts were executed, and defendant further alleges that if said work was more expensive than contemplated by plaintiff, yet, with full knowledge of all the facts, plaintiff agreed to make said excavation at the unit prices stated in the proposals and cannot now be heard to complain in regard hereto.

11. Defendant specifically denies, each and every allegation in plaintiff's second cause of action contained, which is not hereinbefore specifically admitted or denied, with the same force and effect as if each and every of said allegations were hereinbefore specifically denied.

IV

And for a further answer to plaintiff's said second amended petition filed herein, and to each cause of action in said petition contained, this defendant alleges that prior to the making of its said proposal and bid and prior to the making of any agreement or agreements for the construction of said proposed road, plaintiff had actual knowledge that said proposed road would not be built according to the so-called Drummond survey, and had actual knowledge that it would be built according to the revised survey that was then being made; that during all the times that plaintiff was engaged in the work of building and constructing said road, plaintiff had actual knowledge that said road was not being constructed or built according to the Drummond

survey, but that it was to be constructed and was being constructed according to the revised survey; and that plaintiff had actual knowledge of the kind and character of materials that would be encountered and were then being encountered in the construction and building of said road; and that at no time while the work of constructing said road was being done and performed by the plaintiff, and at no time prior to the completion of the building of said road, did the plaintiff make any protest to this defendant in regard to the work which it was required to do, or any protest that said road was not being built according to the terms of said contract, or any protest that said road was being built on a different line from the line on which plaintiff had agreed to build it, or any protest that the excavations and fills as made by the the plaintiff in the building and construction of said road, were in any manner different from [fol. 84] the excavations and fills which the plaintiff had agreed to make; that plaintiff performed all the work and labor required by it to be done and performed in the work of building said road without making any protest whatever in regard to the nature and character of said work; that plaintiff filed with the defendant its claim for payment for work which it had done and performed in the construction of said road on the basis of the unit prices mentioned in its proposal and provided for in said contracts, and that plaintiff during all the time that it was engaged in the construction of said road accepted payment from the State of Wyoming for such work so done and performed by it on the basis of such unit prices.

Defendant further states that by reason of plaintiff's having done and performed all of said work and labor so required by the defendant to be done and performed in the building of said road, and by reason of its having completed the building of said road without protest and without calling the defendant's attention to any of the matters now set forth as a basis for its claim for damages in its petition herein, and by reason of its having filed with this defendant its claim for payment for the work done and performed on the basis of the unit prices mentioned in its proposal and provided for in its said contracts, and by having accepted payment from the State of Wyoming for such work and

labor on the basis of such unit prices, plaintiff is now estopped from asserting or claiming that there was any fraud, deceit, misrepresentations or implied warranties of any kind on the part of this defendant, or its agents, prior to or during the time that said road was being built, or that the plaintiff was in any way misled or injured by any act or acts of this defendant or its agents, and that by reason of the facts aforesaid plaintiff is also estopped from claiming or recovering any compensation for the construction of said road in addition to, or other than, the compensation provided for in said contract with the State of Wyoming and said supplemental agreement.

V

And for a further defense to plaintiff's said second amended petition filed herein, and each cause of action in said amended petition contained, this defendant alleges that the so-called contract as alleged and set forth in plaintiff's petition was and is a contract made and entered into by and between the plaintiff and the State of Wyoming as parties thereto; that the State of Wyoming and not this defendant is the principal named in said contract and that said [fol. 85] State of Wyoming is the real party in interested in this action; that at the time said contract was entered into this defendant was acting merely as the agent for the State of Wyoming in making and entering into said contract; and that the plaintiff well knew that this defendant was then acting and during all the times mentioned in plaintiff's petition acted as such agent and in no other capacity; that the said State of Wyoming is a sovereign and independent commonwealth, and under the provisions of the Constitution of the United States of America, said State of Wyoming cannot be sued by the citizens of any other State in this Court or any other court without its consent; that said State of Wyoming has not given its consent to the bringing of this action or of any action against it in this Court.

VI

And for a further defense to said second amended petition of plaintiff herein, and to each cause of action in said petition contained, this defendant alleges that at all times

mentioned in plaintiff's petition said defendant was, and now is, merely an agency of the State of Wyoming, and that any suit against this defendant is in truth and in fact a suit against the State of Wyoming; that said State of Wyoming is a sover-ign and independent commonwealth and under the provisions of the Constitution of the United States of America cannot be sued by the citizens of any other State in this Court or any other court without its consent; that said State of Wyoming has not given its consent to the bringing of this action or any other action against it in this Court, and that there is no provision in the Constitution or Statutes of the State of Wyoming authorizing or permitting the bringing of an action of this nature against this defendant in this Court or any other court.

VII

And for a further answer to plaintiff's second amended petition filed herein, and to each cause of action therein contained, this defendant alleges:

That on or about the month of May, 1922, said defendant published a notice calling for bids and proposals to construct a highway through a portion of what is known as the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming;

That said notice called for the submission of bids or proposals in writing on or before June 1, 1922;

[fol. 86] That on June 1, 1922, said plaintiff, through its officer, agent and representative, submitted a bid or proposal for the construction of a road through said Wind River Canyon;

That said bid or proposal was not based upon the notice published by said defendant and calling for bids or proposals for the construction of said road, or upon the information contained in said notice, but said bid was based upon certain oral representations and information given to the officer, agent and representative of said plaintiff, who presented said bid or proposal to said defendant for and on behalf of said plaintiff, which was the only bid or proposal submitted to said defendant by said plaintiff or on behalf of said plaintiff;

That said oral representations and information given to the officer, agent and representative of said plaintiff on the day he submitted said bid or proposal, but prior thereto, consisted of a statement of facts and explanation of the conditions upon which said road would be built, which was entirely different from the information contained in said public notice as published calling for the submission of bids or proposals for the construction of said road, and by said oral representations and statements of facts plaintiff was informed that the road which would be built was not the road described in said call for bids or proposal for construction thereof;

That the cost and value of the work to be performed and services to be rendered and materials furnished in the construction of said road was greatly in excess of the sum of Two Thousand Dollars;

That defendant acting as agent of the State of Wyoming let the alleged contract set forth in plaintiff's second amended petition and thereto attached as Exhibit A, which is dated June 1, 1922, to said plaintiff upon its bid or proposal based upon the oral representations and statement of facts instead of upon a bid or proposal submitted by said plaintiff and based upon the public notice calling for such bid or proposal and the information contained in such notice;

That by reason of the facts aforesaid the said alleged contract as set forth in plaintiff's second amended petition is illegal and void because it was made and entered into contrary to and in violation of the provisions and requirements of Section 3027, Wyoming Compiled Statutes, 1920;

That on or about December 12, 1922, plaintiff and defendant signed and delivered the alleged supplemental agreement, a copy of which is attached to, marked Exhibit [fol. 87] B, and made a part of plaintiff's second amended petition;

That said supplemental agreement was made and entered into for the purpose of employing plaintiff to do and perform certain work and furnish certain materials in the construction of the public highway which plaintiff was at the time constructing for the State of Wyoming through the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming;

That the value of the work and labor performed, services rendered and materials furnished under thhe terms and conditions of said supplemeutal agreement was, and is, greatly in excess of Two Thousand Dollars and the cost of the improvements to be made pursuant to said supplemental contract or agreement was, and is, greatly in excess of Two Thousand Dollars;

That said alleged supplemental agreement was made without the giving of any public notice of the submission of any bids or proposals as required by Section 3027, Wyoming Compiled Statutes, 1920, and the said supplemental agreement is therefore illegal and void and contrary to and in conflict with the provisions and requirements of said Section 3027.

VIII

And — further answer to plaintiff's second amended petition filed herein, and to each cause of action in said petition contained, and as a complete bar to said action, this defendant alleges that at no time prior to the time of the filing of this action in this court, did the plaintiff present to or file with this defendant, or with the State Highway Superintendent of the State of Wyoming, any itemized statement or voucher or any statement or voucher whatsoever of its alleged claim against the State of Wyoming, or against this defendant, covering the items of damages as claimed and set forth in plaintiff's said first cause of action, or the amounts claimed in plaintiff's second cause of action, and that said plaintiff did not at any time present to said State Highway Superintendent for his approval any itemized statement of its said claim or any statement or voucher whatsoever covering said claim; and that at no time prior to the filing of this action in this court did the plaintiff present to or file with the State Auditor of the State of Wyoming, any itemized statement in writing for audit and allowance covering the items of damages as claimed and set forth in its said first cause of action, or the [fol. 88] amounts claimed in its said second cause of action, as required by the Constitution and Statutes of the said State of Wyoming.

Wherefore, having fully answered the petition of plaintiff, defendant prays that said petition be dismissed, and that it may have and recover its costs in this action expended.

David J. Howell, Attorney General for the State of Wyoming. C. L. Rigdon, M. A. Kline, Ray E. Lee, Special Assistants to the Attorney General.

Duly sworn to by David J. Howell. Jurat omitted in printing.

Receipt of a copy of the above answer is acknowledged this 14th day of November, A. D. 1925.

W. L. Walls, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

REPLY—Filed January 14, 1926

Comes now the plaintiff, Utah Construction Company, and for its reply to defendant's answer herein says:

1. Plaintiff denies that the contract of June 3, 1922, was between plaintiff and the State of Wyoming, but states [fol. 89] that the same was between plaintiff and the State Highway Commission of Wyoming as alleged in plaintiff's second amended petition and not otherwise. Plaintiff denies that it was agreed between the parties to said contract that the plans under which said road was to be constructed were other than is set out in said second amended petition of plaintiff, and denies that it was agreed between the parties to said contract that the said road should be constructed in accordance with a certain revised survey then being made by the State Highway Engineer, or according to any other survey than the said Drummond survey. Plaintiff admits that it was agreed between the parties to said contract that the road as located in the said Drummond plans should be constructed as to Section "D" in accordance therewith; but denies that the said road as to Section "B" and "C" was to be constructed according to any plans

except the said Drummond plans. Plaintiff denies that it was fully, or otherwise, explained to plaintiff and/or that plaintiff was advised in all or any particulars of the differences in location between the said two surveys and/or was advised that no detailed plans for the construction of said proposed road were available at the time of making said proposal and bid and/or at the time of execution of said contract. And plaintiff denies that it was agreed at the time of the making of said proposals or at the time of the execution and/or delivery of said contract, or at all, that plaintiff was to construct said road as to Sections "B" and "C" thereof according to plans of the said revised survey which were then being made, or according to any other survey than that represented by the Drummond plans.

2. Plaintiff denies that all or any extra excavation called for by projected changes in the Drummond survey was included in the estimates of quantities contained in the proposals submitted by plaintiff before the execution of the said contract of June 1, 1922, and denies that the same was known to plaintiff prior to the execution of said agreement of June 1, 1922, or prior to the execution of the said supplemental agreement. Plaintiff denies that at the time of the execution of said supplemental agreement plaintiff was informed in any manner that the said road was to be constructed and/or was then being constructed according to the said revised survey, and plaintiff denies on its information and belief that the so-called revised survey had been completed prior to the said supplemental agreement. And in this connection plaintiff states that the so-called revised [fol. 90] survey mentioned in said answer was not in fact a revised survey but a complete and new survey of the said highway. Plaintiff denies that it was informed or knew at the time of the making of said supplemental agreement that the extra excavation or tunneling referred to therein was called for by said new survey and/or the plans made in accordance therewith.

3. Plaintiff denies that the great part, or any [substantial] proportion, of the said Corwine & Olson survey was completed on or before June 1, 1922, or was completed before any construction work was done by plaintiff; but in

this connection plaintiff states upon its information and belief that at the time when the said construction work was commenced by plaintiff a considerable portion of the survey upon the ground and the actual staking thereof had been done by Corwine and Olson.

4. Plaintiff denies that there were any new specifications as alleged in paragraph 9 of the answer or any specifications other than those attached to the written contract executed by the parties on or about June 1, 1922, and plaintiff denies that the plans of the Corwine & Olsen survey plainly showed on their face or otherwise that they were entirely different and called for an entirely different road to be constructed from that shown on the Drummond survey, and plaintiff denies that at any time prior to the time these plains were handed to it, and/or for a considerable time after the same were handed to plaintiff, that it knew that said road was to be constructed and was being constructed on an entirely different line from the Drummond survey and upon said Corwine & Olsen survey. And in this connection plaintiff states that not until the work was substantially completed did it learn that there had been an entirely new survey and change of plans by the defendant.

5. Plaintiff denies that the contract of June 1, 1922, was entered into between plaintiff and the State of Wyoming or otherwise than as alleged in plaintiff's second amended petition. Plaintiff denies that the said resurvey of said proposed road was completed on or about July 15, 1922, but in this connection plaintiff states upon its information and belief that the said resurvey was not finally completed until on or about the spring of 1923. Plaintiff denies that it was agreed at any time between the plaintiff and defendant that the said highway should be constructed in accordance [fol. 91] with said resurvey and denies that the said supplemental contract was executed for the purpose of carrying into effect any such agreement.

Plaintiff further denies that the plans of said Corwine and Olson survey necessitated any large additional quantities of excavation over that provided in the Drummond survey.

6. Replying to defendant's answer to the second cause of action this plaintiff incorporates as its reply thereto the denials hereinbefore given.

7. Replying to the entire answer, plaintiff denies that it had full or any knowledge that the work done by it in constructing said highway was according to a new survey or according to any plans *or according to any plans* except the original Drummond plans with the projected changes therein referred to with the addition of certain tunnel excavations and other changes of a minor nature referred to in the said supplemental agreement.

8. Plaintiff denies that prior to the making of its said proposal, bid and its contract of June 1, 1922, or at any time thereafter up to the substantial completion of the road, plaintiff had actual or any knowledge that said proposed road would not be built according to the so-called Drummond survey, or had actual or any knowledge that it would be built according to any revised or any survey which was then being made or was thereafter to be made. Plaintiff admits that it made no protests over the change in the survey and plans, except as alleged in the second amended petition, except that as soon as plaintiff discovered that said change in survey and plans had been made as alleged in said amended petition, which was after the substantial completion of the road, it did protest to defendant with respect to the same and with respect to the additional work required. Plaintiff states that while it received compensation from the State Highway Commission for the work which was done according to the unit prices which had been bid, it received such compensation without knowledge that it had constructed said highway along the line of an entirely new survey and/or had constructed the same at such excessive and extra cost and expense, as is alleged in said second amended petition. And in this connection plaintiff states that not until the work was actually done by it did it fully learn of the great and complete change which had been made in the line of the said highway and in the staking for the same, as is alleged in said second amended petition. And in this connection plaintiff denies that it is estopped [fol. 92] from now asserting its claim as alleged in said second amended petition against the defendant for the

reason that plaintiff was not advised or notified by defendant, and plaintiff did not know that the said road as constructed by it had been staked along an entirely different route and according to an entirely different plan and scheme than that contained in the so-called Drummond plans. In this connection plaintiff denies that it was not misled by the acts of the defendant; but states that the acts of the defendant in staking the road, for plaintiff's guidance, according to an entirely new route and survey and according to an entirely different plan than the road which plainitff had contracted to build, did deceive plaintiff and that plaintiff was deceived and misled thereby and induced to build the said road without knowledge that it was performing such large, additional and excessive service.

9. Referring to the further defense of plaintiff and in reply thereto and to the entire answer, plaintiff denies that the said contract referred to in its second amended petition was made between plaintiff and any other body than the defendant, and denies that the State of Wyoming is a party to said contract or the real party in interest in this action. Plaintiff admits that in making said contract the defendant was acting as an agent of the said state in the sense that the defendant was authorized to contract under the provisions of the statute of the State of Wyoming creating the State Highway Commission of Wyoming; but plaintiff denies that it knew at the time of the making of said contract of June 1, 1922, or at any other time, that the defendant was acting in any other capacity than as the State Highway Commission, created under the aforesaid statute of the State of Wyoming.

10. Plaintiff denies that this suit is in truth and/or was in fact a suit against the State of Wyoming, and denies that the said State of Wyoming has not given its consent to the bringing of this action, but alleges that such consent has been given.

11. Plaintiff admits that on or about the month of May, 1922, defendant published a notice calling for bids and proposals to construct the said highway through Wind River

Canyon, Wyoming, and that the plaintiff submitted its bid for proposal, as stated in its second amended petition, but denies that said bid and/or proposal was not based upon the said published notice and was not based upon the in- [fol. 93] formation contained in said notice, and denies that said bid was based upon any oral representations and/or information given to any officer or representative of plaintiff. Plaintiff denies that there was any oral representation or information given to plaintiff or any representative of plaintiff on the day plaintiff submitted said bid, or at any time, consisting of a statement or statement of fact and/or explanation of conditions upon which said road should be built which was entirely different from the information contained in said public notice, or substantially different therefrom, and denies that by any oral representation and/or statement of fact plaintiff was informed that the road which would be built was not the road described in said call for bids or proposal for construction thereof. Plaintiff denies that the defendant let the said contract attached to said second amended petition as Exhibit "A" to plaintiff upon any bid or proposal by plaintiff based upon any oral representation and/or statement of facts. Plaintiff denies that the said contract attached to its second amended petition as Exhibit "A" was irregular and/or void, and entered into contrary to or in violation of the provisions of Section 3227 Wyoming Compiled Statutes of 1920.

12. Plaintiff states that while it did not, prior to the commencement of this action, present any itemized statement or voucher of its said claim as set forth in said second amended petition to the said State Highway Superintendent or the defendant, plaintiff did, prior to the filing of this action, make its claim to the said Commission for additional compensation above that allowed in the final estimate of the State Highway Engineer referred to in plaintiff's second amended petition, and that plaintiff was thereupon informed by the defendant that no additional amount would be allowed than that allowed in the said final estimate of the said State Highway Engineer and that any claim it might make thereto would be rejected.

13. In further reply, plaintiff states that prior to and at the time that plaintiff made its said written proposal to the defendant for the construction of said Wind River Canyon road, and at the time of the making of the said contract referred to in the second amended petition as Exhibit "A," there was on file with the said Commission detail plans for the construction of said highway together with cross-section notes of the survey thereof and cross-sections, and that [fol. 94] said proposal for the construction of said highway referred to said plans on file with the Commission and the contract entered into referred to the same and to the said cross-sections, and plaintiff was furnished by the defendant with what purported to be a copy of said plans based upon the said Drummond survey. That by reason of such fact plaintiff was led to believe and did believe that the said plans and cross-sections and field notes were the approved plans, cross-sections and field notes of the road to be built, and the survey of the same, and entered into the said contract under said belief and performed the construction work thereon under said belief, and that the defendant having in such manner represented said plans to be as alleged is now estopped from denying that said survey, plans, notes and cross-sections were the approved plans of the defendant existing at the time of the making of said contract. That at the time of the making of said contract there were on file with the defendant no other plans or notes or cross-sections of the survey.

And this plaintiff denies generally and specifically each and every allegation of new matter in the defendant's answer contained not herein specifically admitted.

Wherefore, plaintiff having replied to defendant's answer, prays for the relief as demanded in its said second amended petition.

Benjamin S. Crow, Boston Building, Salt Lake City, Utah, W. L. Walls, Hynds Building, Cheyenne, Wyoming, Attorneys for Plaintiff.

Duly sworn to by Wm. L. Walls. Jurat omitted in printing.

[fol. 95] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLY—Filed November 6, 1926

Comes now the defendant the State High Commission of Wyoming and demurs to the reply filed herein by the plaintiff on the ground and for the reason that said reply and the record herein show upon their face that this court is without jurisdiction of the subject or subjects of the action alleged in plaintiff's pleadings, and because this court has no jurisdiction of this action.

II

Comes now said defendant the State Highway Commission of Wyoming and demurs to the reply of said plaintiff filed in this action upon the ground and for the reason that same is insufficient in law upon its face.

III

Comes now said defendant the State Highway Commission of Wyoming and hereby renews and reasserts its demurrers to the second amended petition of the plaintiff herein, upon the grounds and for the reasons therein stated.

David J. Howell, Attorney General of Wyoming, M. A. Kline, Ray E. Lee, Special Assistant Attorney General of Wyoming, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRER AND DISMISSING CAUSE—December 4, 1926

This case having heretofore come on to be heard upon a demurrer to the reply, as well as a general demurrer to the petition herein, which demurrers challenge the jurisdiction of the Court, and having been argued by B. S. Crow, [fol. 96] Esquire, and W. L. Walls, Esquire, attorneys for plaintiff, and Marion A. Kline, Esquire, Ray E. Lee, Esquire, and John Dillon, Esquire, attorneys for defend-

ant, and having been taken under advisement by the Court, and the Court having considered the same, and being now fully advised in the premises, it is ordered by the Court that said demurrers be, and they are hereby, sustained, and this case be, and the same is hereby, dismissed, at the cost of the plaintiff.

Wnerefore, it is considered, ordered and adjudged by the Court that the defendant go hence hereof, without day, and have and recover of and from the plaintiff its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

Dated December 4, 1926.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed January 20, 1927

To the Honorable T. Blake Kennedy, Judge of the District Court aforesaid:

Now comes Utah Construction Company, a corporation of the State of Utah, by its attorneys and respectfully shows that on the 4th day of December, A. D. 1926, the Court sustained defendant's demurrers respectively to plaintiff's reply and plaintiff's petition in the above cause, and thereupon made and entered a final judgment in favor of the said defendants and against your petitioner, who was plaintiff in said cause, dismissing the said cause and adjudging that the above named defendants go hence hereof without day, and do recover their costs from the plaintiff.

Your petitioner, feeling itself aggrieved by said judgment and the said order sustaining said demurrers, herewith petitions the court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Eighth Circuit, under the laws of the United States made and provided.

Wherefore, the premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at St. Louis, Missouri, in said circuit, for correction of the errors complained of and herewith assigned,

be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as [fol. 97] the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of such writ of error by the Circuit Court of Appeals.

John W. Lacey, Herbert Lacey, W. L. Walls, Benjamin S. Crow, Story & Crow, Attorneys for Petitioner in Error.

Copy of the foregoing petition received this — day of January, A. D. 1927.

William O. Wilson, M. A. Kline, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 20, 1927

Now comes, Utah Construction Company, a corporation, plaintiff, and plaintiff in error in the above numbered and entitled cause, and in connection with its petition for a writ of error in this cause, assigns the following errors which plaintiff in error avers occurred on the trial thereof, and in the action and decision of the court with respect to the issues of law therein, and upon which it relies to reverse the judgment entered herein, as appears of record:

1. The court erred in sustaining the said defendant's demurrer to plaintiff's reply filed in this cause.

2. The court erred in sustaining said defendant's demurrer to plaintiff's second amended petition filed in this cause.

3. The court erred in making and entering its judgment of dismissal and for costs against this plaintiff.

4. The court in sustaining said demurrers, erred in holding that this court had no jurisdiction of this action, and is without jurisdiction of the subject or subjects of the action; because the said second amended petition and said reply show that this court has jurisdiction of the cause in that it is a suit at common law between citizens of different states

in which the matter in controversy exclusive of interest *nad* [fol. 98] costs exceeds the sum and value of three thousand dollars, and is not a suit against the State of Wyoming.

5. The court erred in sustaining Defendant's demurrer to the first cause of action of plaintiff's second amended petition on the ground that the same does not state facts sufficient to constitute a cause of action.

6. If it shall be held that the court was without jurisdiction, and the demurrer on such ground was rightfully sustained, then the court erred in dismissing the cause on its merits, and in not placing its dismissal specially on the ground that the court had no jurisdiction, and not dismissing said cause without prejudice.

Wherefore, plaintiff in error prays that the judgment of said court be reversed.

John W. Lacey, Herbert Lacey, William L. Walls, Benjamin S. Crow, Story & Crow, Attorneys for Plaintiff in Error.

Copy of the foregoing assignments of error received this — day of January, A. D. 1927.

William O .Wilson, M. A. Kline, Attorneys for Defendant.

Bond on writ of error for $500.00 approved and filed January 20, 1927, omitted in printing.

[fol. 99] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed January 20, 1927

To the Clerk of the above-entitled Court:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the [fol. 100] Eighth Circuit, pursuant to a writ of error granted in the above entitled cause, and to include in such transcript of record, the following, and none other papers:

1. Plaintiff's Second Amended Petition, including exhibits attached thereto, filed.
2. Demurrer of defendant to the Second Amended Petition, filed.
3. Order made and entered overruling Defendant's said demurrer.
4. Defendant's Answer to the Second Amended Petition, filed.
5. Plaintiff's reply to Answer, filed.
6. Demurrer of Defendant to Second Amended Petition and Reply, filed.
7. Order sustaining Demurrer and Judgment of Dismissal made December 4, 1926.
8. Petition for Writ of Error.
9. Assignments of Error.
10. Supersedeas Bond.
11. Original Writ of Error.
12. Original Citation.
13. This Præcipe.

John W. Lacy, Herbert Lacey, William L. Walls, Benjamin S. Crow, Story & Crow, Attorneys for Plaintiff in Error.

Services of the foregoing Præcipe by receipt of copy, admitted this — day of January, A. D. 1927.

M. A. Kline, Attorney for Defendant, The State Highway Commission of Wyoming.

[fol. 101] IN UNITED STATES DISTRICT COURT

OPINION ON OVERRULING OF DEMURRER TO AMENDED PETITION—Filed October 16, 1925

KENNEDY, Judge:

This is an action at law brought to recover damages alleged to have grown out of a contract between plaintiff and defendant. It is before the court at the present time upon (1) a motion to strike certain portions of the second cause of action, (2) a demurrer challenging the jurisdiction of the court, and (3) a general demurrer to the first cause of

action. It will be necessary to examine briefly plaintiff's second amended petition.

The petition sets forth that the plaintiff is a corporation and a citizen and resident of the State of Utah; that the defendant, State Highway Commission of Wyoming has been designated as such by an act of the State legislature of Wyoming and consists of the five commissioners named in the title; that it and they are each residents and citizens of the State of Wyoming and the said Commission has power to sue and be sued under the provisions of the statute creating it; that the matter in controversy exceeds the value of three thousand dollars, exclusive of interest and costs; that the Commission is engaged in the construction of highways in the State, acting th-ough its Superintendent and Highway Engineers; that a plan was perfected for the construction of a highway through what is known as the Wind River Canyon of a length exceeding thirteen miles, for which bids were asked and in which proposals the substantial route, grades and materials to be moved were designated; that the plaintiff entered a bid upon the proposed construction which was accepted, a contract between the plaintiff and the Commission entered into, and thereupon the plaintiff proceeded to perform the work which it carried to completion and an acceptance by the Commission; that after the plaintiff had started work changes were proposed which necessitated the execution of a supplementary contract calling for additional work, which was to be paid for upon a basis adopted in the original contract. The plaintiff then alleges in substance, that in making the changes in plans which the supplemental contract purported to cover, the defendant through its engineers made a substantial departure from the original survey, removed or destroyed the stakes of the original survey and substituted new ones without distinctive marks and that the plans so substituted did not advise plaintiff on their face that they [fol. 102] represented a substantial departure from the lines of the original survey. The petition then alleges the manner in which the original survey was changed by the revised plans and in particular the additional work which this change placed upon the plaintiff, setting forth in detail the reason why the cost to the plaintiff could not be absorbed under the supplemental contract, on account of extra slough-

ing, hauling, borrowing, wasting, hand-sorted rock surfacing, increased excavation, and extra work of a similar nature. For this extra work the plaintiff claims damages in excess of $486,000. This in substance represents plaintiff's first cause of action.

The second cause of action is a suit to recover the balance withheld by the defendant upon the original and supplementary contract price in a sum in excess of $88,000, which it is alleged defendant has refused to pay plaintiff unless it will release all claims for extra compensation. Into this second cause of action nearly all of the allegations of the first cause of action are introduced by adoption.

In the motion to strike, defendant seeks to have eliminated from the second cause of action those paragraphs which relate to the basis of claim for extra compensation. While not necessary to a statement of the second cause of action, counsel for plaintiff contends that they are properly there as correctly setting forth its reasons for failing to accept the balance due as computed by the Highway Department under the original and supplemental contracts. Inasmuch as it is clear from the allegations of the second cause of action that through it the plaintiff is seeking only to recover the balance due as calculated by the Highway Commission, it seems to the court that no ill effects can be suffered by the defendant in allowing these paragraphs to remain as a portion of the second cause of action simply for the purpose stated, no damages being asked in it for extra compensation. The motion to strike will therefore be overruled.

In a special demurrer, the defendant challenges the jurisdiction of the court, the point being, that the suit is one against the State of Wyoming in which the plaintiff is a non-resident, thereby bringing the cause into controvention of the Eleventh Amendment to the Constitution of the United States, which reads:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

[fol. 103] In the opinion of the court, the special demurrer must be overruled. In the first place, the Highway Commission is an agency of the state authorized to carry on certain designated functions. While the act creating it (Wyo. Comp. Stats. 1920, sec. 3025) does not specifically state that the Commission shall be a corporation, it does state that it shall consist of five state highway commissioners and specified the manner in which they shall be selected. The petition alleges that the commissioners comprising it are all residents of the State of Wyoming. In the case of Thomas vs. Board of Trustees, 195 U. S. 207, in which the Trustees of the Ohio State University were sued in the Federal court and the question of jurisdiction was raised by reason of the fact that the act of the legislature did not constitute the board as a corporation, it was held that had the petition shown that the individual members comprising that board were each residents and citizens of the State of Ohio, the board would be entitled to be sued by their collective name.

Again, the act creating the Commission specifically provides that it may sue and be sued in its name as the State Highway Commission upon any contract executed by it. In the case of Smith vs. Reeves, 178 U. S. 436, Mr. Justice Harlan in delivering the opinion of the court at page 444-441, says:

"But it is contended that by the section of the Political Code of California above quoted the State has consented that its Treasurer may be sued in respect of the matters specified in that section, and it is argued that this case comes within the decision in Beers vs. Arkansas, 20 How. 527, 529, in which it was said to be an established principle of jurisprudence in all civilized nations that while the soverign cannot be sued in its own courts or in any other without its consent and permission, a State 'may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another State.' So in Clark vs. Barnard, 108 U. S. 436, 447: 'The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit,

otherwise well brought in, which a State had sufficient interest to entitle it become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controveries between it and citizens of other States.'

[fol. 104] "It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts."

In the case of Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, at page 391, is found the following language:

"Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal Courts. Cowles vs. Mercer County, 7 Wall. 118; Lincoln County vs. Luning, 133 U. S. 529; Chicot County vs. Sherwood, 148 U. S. 529.

"We need not, however, rest on the general powers of a Federal Court in this respect, for in the act before us express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit."

It will be noted that the statute creating and empowering the defendant Commission, uses the broad term "in any court." The point was raised where the language of the statute only used the term "District Court," and Judge Dietrich of the Federal Idaho court, in the case of Interstate Const. Co. vs. Regents of the University of Idaho, 199 Fed., 509, at page 512, broadly construes such a statute, cites numerous authorities from the United States Supreme Court sustaining the view which the court has taken upon this and the General principle involved. A portion of his language is:

"While the phrase 'district court,' as here used, doubtless refers to the state district court, it is not thought that the Supreme Court intended to limit the rights of contrac-

tors to the state tribunals. The state district court was referred to, because it is the court of original general jurisdiction in the state. The holding of the Supreme Court seems to be that the defendant, a body corporate, may sue and be sued as any other corporation organized under the laws of the state. In that view, the sovereign has consented that, in so far as it is represented by the 'Regents of the University of Idaho,' it may be sued in this court. Beers vs. Arkansas, 20 How. 527, 529, 15 L. Ed. 991; Clark vs. Barnard, 108 U. S. 436, 447, 2 Sup. Ct. 878, 27 Ed. 780; Railway Co. vs. Whitton, 13 Wall. 270, 286, 20 L. Ed. 571; Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, 391, [fol. 105] 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth vs. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; Smith vs. Reeves, 178 U. S. 436, 440, 20 Sup. Ct. 919, 44 L. Ed. 1140."

The defendant further contends, however, under its general demurrer to plaintiff's first cause of action, that that pleading does not state a cause of action, maintaining among other things, that it appears from the face of the petition that any extra work performed was performed under the supplementary contract which is amply and sufficiently covered by the second cause of action; that the plaintiffi having performed the work without protest it cannot recover as for breach of contract; that the plaintiff cannot recover because of false representations, since none are specifically or sufficiently alleged; that the cause of action does not state a suit upon breach of implied warranty because none is pleaded; that the action is one on quantum meruit which cannot be maintained; and that no presentation of the claim had been made to the State Auditor which is a pre-requisite to the collection of moneys which come from the State.

Counsel for defendant have presented many authorities sustaining their various contentions and the point in controversy are not free from doubt. If the suit as set up in the first cause of action shows upon its face that it comes within the original and supplemental contracts, of course it cannot be maintained. Likewise, if it is a suit on quantum meruit it is probable that it cannot be maintained. On the other hand, if it be construed as a suit on the contract, it is possibly maintainable. A number of cases are cited

by counsel for defendant in support of its contention that the suit here is on the contract and that the alleged representations made by the defendant's officials which misled the plaintiff, entitles plaintiff to maintain its suit. In the case of Christie vs. United States, 237 U. S. 234, the holding of the court concerning the point involved is expressed in the syllabus in the following language:

"Where there is a deceptive representation in the specifications as to the material to be excavated which actually misleads the bidder who obtains the contract, and it is admitted by the Government that time did not permit borings to be made by the contractor to verify the representations, the latter is entitled to an allowance for the actual amount expended over what would have been the cost had the boring sheets been accurate, notwithstanding there was no sinister purpose whatever.

[fol. 106] "The legal aspects of such a case are not affected by the fact that the omissions amounting to misrepresentations did not have a sinister purpose."

In United States vs. Gibbons, 109 U. S. 200, a case in which a contractor was allowed damages against the Government growing out of a contract to repair walls, a portion of which had been destroyed and excluding portions which had been uninjured by fire, it was held that inasmuch as certain portions had been left standing in the clearing away process, it was the representation of the Government officials that the standing portions were uninjured and did not come within the contract and that as a consequence when the contractor was required to rebuild this portion of the standing walls because they were subsequently adjudged unsafe, that the contractor was entitled to recover compensation covering the extra work. The point was decided upon the theory that it was the duty of the government agents to point out to the contractor the work deemed to be sufficiently uninjured to remain.

In the case of United States vs. Atlantic Dredging Co., 253 U. S. 1, a controversy arose between the parties over the matter of extra compensation claimed by the company on account of the fact that the Government had concealed from the contractor the results of certain borings which had brought information to the Government officials that

the material to be removed was much heavier than that shown by the plans and specifications; and although there was no guaranty as to what the material to be removed actually was and the contractor was required to make his independent examination, it was held that the representations of the Government officials were deceptive in that test borings were made by the Government and information secured which was not imparted to the bidder and that in consequence the contractor should be entitled to recover. This cause holds that such a claim is not one in tort but in contract and seems to place it upon the basis of a warranty arising out of the contract. The decision further holds that having elected to continue the work, the contractor did not forfeit his right to extra compensation. In this respect the language of the court at page 11, is as follows:

"The Government, however, contends that, at best, the alternative was presented to the company, when it discovered the character of the materials, to either quit work and sue for damages, or continue the work; and that having elected the latter, it cannot now resort to the other. In for-
[fol. 107] tification of this contention it is said that 'even if the Government had made a misrepresentation as to the borings, that misrepresentation would necessarily have been as to the character of the materials to be dredged, and claimant knew all there was to know about this from the 'very beginning.' '

"This assumption and the extent of it and the conclusion from it, are not justified. It is true the company discovered that the material it encountered was different in character from that represented, but the company did not know of the concealment of the actual test of the borings, and the fact that the company attempted to struggle on agaginst the difficult conditions with its inefficient plant should not be charged against it. In other words, it should not now be held to have been put to the suggested election. It did not know at that time of the manner in which the 'test borings' had been made. Upon learning that they had been made by the probe method, it then elected to go no further with the work, that is, upon discovering that the belief expressed was not justified and was in fact a deception. And it was not the less so because its impulse was not sinister or fraudulent.

"The Government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We cannot assent. There is no intimation of bad faith against the officers of the Government and the Court of Claims regarded the representation of the character of the material as the nature of a warranty; besides, its judgment is in no way punitive. It is simply compensatory of the cost of the work, of which the Government got the benefit."

The case of United States vs. Spearin, 248 U. S. 132, arose over the construction of a dry-dock for the Government according to plans and specifications which involved the reconstruction of a sewer which intersected the site. The contractor was required to reconstruct the sewer, which he did, but owing to conditions of drainage which were known to the Government but not known to the contractor during flood season, the sewer as constructed was not adequate and damage resulted to the dry-dock excavation. The contractor refused to proceed unless the Government would pay extra compensation in making good the damage or assuming responsibility for future damage. This the Government refused to do, the contractor declined to proceed, the Government annulled the contract and the contractor brought suit, the court holding that he should be entitled to [fol. 108] recovery what would have been his profit had the extraordinary situation not have arisen. Speaking of the situation thus presented, the court on page 137, uses the following language:

"But the insertion of the articles describing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose

the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

"Neither Par. 3744 of the Revised Statutes, which provides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See Kellogg Bridge Co. vs. Hamilton, 110 U. S. 108. The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obliged to restore the sewer and to proceed, at his peril, with the construction of the dry-dock. When the Government refused to assume the responsibility, he might have terminated the contract himself, Anvil Mining Co. vs. Humble, 153 U. S. 540, d 551-552; but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach."

But it is earnestly urged by counsel for defendant that these cases do not apply to the case at bar, for the reason that they are not analogous, which it must be admitted they are not as to facts, and yet they seem to come near to establishing the principle of law which may govern the situation here presented.

The gist of plaintiff's first cause of action is, that the course of the highway to be constructed was substantially changed by the plans of subsequent engineers in such a way that they were not within the scope of the original or sup- [fol. 109] plemental contracts; that the changes so made were not discoverable from the amended plans and specifications given to the contractor so that he could not know that the changes were general and in effect making a new road, instead of a minor character contemplated by the supplemental contract; and that he was thereby forced to do additional work. It may be that proofs of these allegations will not be sufficient to substantiate the allegations, but on their face the allegations seem to present the theory on the part of the plaintiff, of representations made by the

defendant's officials which were false, at least in so far as they purported to give only such minor changes as were contemplated by the supplemental contract; but if the demurrer should be sustained, the plaintiff would be foreclosed from even an opportunity to present proof of its allegations of the circumstances surrounding the changes which were unknown and undiscoverable to plaintiff. This theory brings the petition within the class of cases where a warranty under the contract is involved. In [with] view also, the suit is on the contract and not on a quantum meruit. Likewise, the situation is not affected by the fact that there was no fraudulent intention or motive involved in the minds of the defendant's officials (United States vs. Atlantic Dredging Co., supra), and in consequence no specific allegations of fraudulent intent need be alleged. The rule laid down in the cases cited also disposes of the contention in so far as the point can be raised by the demurrer at least, that the work being completed without protest does not bar the contractor from asking for extra compensation. No specific allegation of a breach of warranty need necessarily be alleged in these specific terms, I take it, if the statement of ultimate facts in the petition fairly bring it within the scope of such a theory.

As to the contention that the claim should have been previously presented and rejected by the State Auditor, we think it is a sufficient answer to say, that when the State consents that it or its agencies may be sued, the court is only concerned in the matter of permitting the opportunity to establish a claim by judgment and if so established, the court is likewise not concerned in the manner or method of its collection. Particularly should presentation to the Auditor be disregarded here when the law provides that such claims as are approved by the Highway Department can only be allowed by the Auditor and the Highway Department in this instance has refused to approve plaintiff's claim for extra compensation.

[fol. 110] While some of the points raised by the general demurrer are close, we feel that upon the theory advanced by the plaintiff, it should have an opportunity to try out its claim upon the merits, and for the reasons stated, both the special and general demurrers will be overruled, reserving

to all rulings exceptions to the defendant and giving it twenty days within which to plead if it may be advised.

IN UNITED STATES DISTRICT COURT

OPINION ON SUSTAINING OF DEMURRER TO REPLY, ETC.—
Filed December 4, 1926

KENNEDY, Judge:

This is an action in which the plaintiff, a citizen of the State of Utah, seeks to recover of the defendant, damages growing out of a construction contract involving a state highway. The petition was originally met by a demurrer, which after hearing was overruled and an answer filed followed by a reply thereto. The matter is again before the court upon a demurrer filed to the reply as well as a general demurrer to the petition, which last demurrer, as did the one formerly overruled, challenges the jurisdiction of this court, but upon a different ground. Whatever may be the legal formality by which the question is presented, whenever the lack of jurisdiction of the court is suggested, it becomes the court's duty to investigate the matter and if jurisdiction is wanting to dismiss the cause, or if upon removal remand the same. Section 37, U. S. Judicial Code.

Under the demurrer which was overruled, the point suggested was that the court was without jurisdiction because the suit was against the State of Wyoming and therefore in contravention of the Eleventh Amendment to the Constitution of the United States forbidding the judicial power of the United States to extend to suits against the states by citizens of another state. In this respect the court ruled, in effect, that, inasmuch as the legislature creating the State Highway Commission of Wyoming had by an act authorized it to sue and be sued in any court, then whether or not the suit was aginst the Highway Commission as a distinct entity, or against the State itself was immaterial, because the State had by its affirmative act waived its immunity under the Eleventh Amendment and citing as authority Smith vs. Reeves, 178 U. S. 436; Clark vs. Barnhard, 108 U. S. 436. This court then entertained the view

[fol. 111] which has recently been expressed by the Eighth Circuit in the case of Hertz vs. Knudson, 6 Fed. (2d) 812, where at page 816 the court says:

"The Eleventh Amendment to the Constitution which provides that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state,' is not here involved. By this amendment a privilege is granted for the benefit of the state, which applies specifically to suits prosecuted against the state. It has been uniformly held under this amendment that a state cannot be made a defendant in a federal court against its consent, but that the privilege may be waived if the state sees fit voluntarily to submit itself to the jurisdiction."

Upon the presentation of this demurrer, however, it is suggested that even though the state has waived its immunity, it still being insisted that the action is one against the state, that the United States District Court has no jurisdicion of the subject matter and jurisdiction cannot be conferred by consent of the parties or by consent of the state to be sued in the courts of the United States, the gist of the argument being, that the jurisdiction here is wanting because the suit is based upon an amount in controversy in excess of the statutory limitation and the diversity of the citizenship of the parties, and that the diversity of citizenship is destroyed because of judicial holdings that the state is not a citizen.

Two points therefore press for determination in the present controversy, first, it now becomes necessary to determine whether or not the action is in effect one against the state, and second, if so, whether or not this court has jurisdiction of the case.

In the determination of the first question, a brief analysis of the nature of the action and an examination of the law under which roads of the character in controversy are constructed would seem to throw some light upon the subject. The contract sued upon, entered into in June, 1922, was for the construction of a state highway in what is known

as the Big Horn Canyon in this state, and called for such construction according to plans and specifications made by the State Highway Engineer. There was also a supplemental contract calling for additional excavation upon the same basis of remuneration as the original contract. The [fol. 112] petition sets forth in substance, that after the first plans and specifications were presented they were subsequently changed by other engineers of the department in such a way that it made substantially a new route, which the plaintiff did not discover until near the completion of the contract, thereby causing the plaintiff to suffer additional and extraordinary expense in completing the project, which the plaintiff sues to recover. In a former hearing upon a general demurrer to the petition this court held that the action was in its nature one upon a contract and not an action upon quantum meruit, upon the strength of the following cases: Christie vs. United States, 237 U. S. 234; United States vs. Atlantic Dredging Co., 253 U. S. 1; United States vs. Gibbons, 109 U. S. 200; United States vs. Spearin, 248 U. S. 132. The contract itself by its caption recites that the agreement is between the State of Wyoming, acting th-ough the State Highway Commission and the plaintiff, is executed by the State Highway Commission through its superintendent, and provides that the work shall be done under the direct supervision of the Highway Commission, subject to inspection and approval by the Secretary of Agriculture under the Act of June 11, 1916, thereby showing that the construction involved was under what is known as the Federal Aid Act.

The law pertaining to the question is found in the Wyoming Constitution and statutes. In 1916 Wyoming adopted an amendment to her Constitution known as Section 9 of Article 16, which reads as follows:

"The provision of Section 6 of Article 16 of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public lands and highways in whole or in part by the state, either directly or by ex-

tending aid to the counties; and notwithstanding such inhibition as to works of internal improvement, whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such work in the aid of their completion."

[fol. 113] Under this constitutional provision, in 1919 the legislature adopted an act now known as Chapter 185 of the Wyoming Compiled Statutes of 1920, providing for the issuance of bonds for road building purposes and the same year passed an act authorizing the state to go into the road building business, such act being known as Chapter 186 of the same compiled statutes. The latter act by its terms provides, among other things, that a state highway department be created to consist of the State Highway Commission and a State Highway Superintendent; that the commission shall consist of five state highway commissioners who shall be appointed by the Governor by and with the consent of the Senate; that the commissioners shall qualify by taking the constitutional oath of office; that the commission shall maintain offices in the state capitol; that the commission shall have power to sue in the name of the "State Highway Commission of Wyoming," and may be sued in any court upon any contract executed by it; that the Attorney General shall be legal advisor of the commission; that the commission shall have an official seal; and that all records of its office certified under the hands of its secretary shall be received in any court; that the commission shall appoint a state highway superintendent who shall take the constitutional oath of office upon qualifying; that said superintendent shall have complete charge of laying out and establishing highways; that the commission shall have authority to acquire rights of way by condemnation proceedings; that the work to be performed upon highways, except where the same is in co-operation with the Secretary of Agriculture, shall be performed at the expense of the state; that the commission shall have power to co-operate with counties in the construction of highways; that there be created a fund to be known as the state highway fund, in which the

State Treasurer shall place all moneys received from any source for highway purposes, which shall be paid out only on vouchers approved by the State Highway Superintendent; that there is appropriated the sum of $300,000.00 made available for road building on and after March 1, 1920, and all balances remaining of the fund shall not revert to the general fund but be subject to subsequent expenditure; and that the overhead expense in connection with the administration shall not exceed fifteen per cent of the total amount expended each year.

Is the action upon a contract such as here outlined under the constitution and statutes referred to, one in effect against the State of Wyoming or one against a separate [fol. 114] entity created by the State, so as to take it out of the class of cases held to be against the State?

The Supreme Court of Wyoming in Hjorth Royalty Company vs. Trustees of the University, 30 Wyo., 309, it being a suit to quiet title to lands, held that the State was the real party in interest, that the suit in effect was one against the State and that in the absence of legislative consent to suit, it could not be maintained.

In a recent decision in the case of Fidelity and Deposit Company of Maryland vs. The Trustees of the University of Wyoming, No. 1658, (not yet reported) this court held that that case was in effect a suit against the state which could not be maintained for the reasons that the State, although designating them as a corporate body, had not given the Trustees of the University authority to sue or be sued, and further that the relief sought was simply to direct and compel the trustees under a construction contract, to carry out the functions delegated to them by statute and that the case therefore fell within a class which made it in effect a suit against the State, as distinguished from a class where state officials were presuming or threatening to perform acts in violation of constitutional rights, in which latter class the courts have held that such suits are not against the state, but against individuals who, although state officials, purport to do unlawful things. This distinction is clearly drawn in the cases there cited and particularly summarized in the case of Pennoyer vs. McConnaughy, 140 U. S., 1. Here a similar situation exists in that the cause of action is upon a contract which would place it in the first

class of cases there mentioned, (for if not upon the contract the action is not in our opinion well founded,) but with the difference between the two, that the legislature here has given its agency the power to sue and be sued, not, however, specifically designating it as a corporate body. Does this distinction relieve the suit of its character of being one against the state? In the early decisions of the Supreme Court it was held that the question of the suit being one against a state was to be determined by the fact as to whether or not the state was a party to the record, but this rule has long since been abrogated through a series of decisions culminating in the comparatively recent decision of Ex parte State of New York, 256 U. S. 490, where at page 500 the court says:

"As to what is to be deemed a suit against a State, the early suggestion that the inhibition might be confined to those in which the State was a party to the record (Osborn [fol. 115] vs. United States Bank, 9 Wheat. 738, 846, 850, 857) has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding as it appears from the entire record. Louisiana vs. Junel, 107 U. S. 711, 719, 720, 723, 727-728; Hagood vs. Southern, 117 U. S. 52, 67, et seq.; In re Ayers, 123 U. S. 1, 10, et seq.; Smith vs. Reeves, 178 U. S. 436, 438-440; Murray vs. Wilson Distilling Co., 213 U. S. 151, 168-170; Lankford vs. Platte Iron Works Co., 235 U. S. 461, 469."

In Hopkins vs. College, 221 U. S. 636, at page 642, the court says:

"And, looking through form to substance, the Eleventh Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights."

In the case of Poindexter vs. Greenhow, 114 U. S. 270, the court at page 287 uses the following language:

"It is also true, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subleties."

In the light of this authority in analyzing the issue here, we find that the highway construction over which the controversy arises was initiated by a constitutional amendment which authorized the State of Wyoming to go into the road building business. The State thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. It provided for raising money by bonding itself and taxing its inhabitants for the purpose and providing that such money, as well as that received from other sources, should be accumulated in the hands of its State Treasurer; that its chief legal advisor should be the legal advisor of its agency in the premises; that such agency should maintain its office in the state capitol; that the state might enter into agreements with the [fol. 116] United States for the building of roads, under an Act of Congress, which type of road was here under construction; and directed the manner in which the funds so raised by it should be disbursed, as well as the other incidents which are incorporated heretofore in an analysis of the Wyoming statute.

It is difficult to conceive how any function could be more clearly regarded as an act of the state itself than is the building of state highways in Wyoming. It would therefore be equally clear that the state in the present instance was actually engaged in building the highway in controversy, were it not for the somewhat isolated factor that the state had given its agency for road building purposes the authority to sue and be sued. As to the effect of this provision, counsel argue that it is a definite act which severs the agency from the state itself and makes it a distinct entity. In support of this they cite some authority, largely by state courts, but two cases by the Supreme Court of the

United States, one being Hancock vs. Louisville Railroad Co., 145 U. S. 409, where by an act of the state legislature authorizing a portion of a county within a limited district to issue bonds for building a railroad, it was held that the act of the state thereby created a quasi corporation which was capable of suing and being sued in the courts. It is clear, however, that this was not an entity created by the state for the purpose of carrying into effect purely state functions but was rather an authority of the state to one of its designated areas to contribute to a commercial enterprise in which the state as such had no interest. In the case of Port of Seattle vs. W. W. R. Co., 255 U. S. 56, the Supreme Court held that the suit was not against the state, for the reason solely that the Port of Seattle had been constituted a municipal corporation by the state and that it as such was the real party in interest, even though the state itself had some interest in the controversy. We have found no cases, and none has been called to our attention, (except, perhaps, Bromwell Brush Co. vs. State Board, 279 Fed. 440, a District Court decision which seems out of harmony with the later Supreme Court decisions), where an agency of the state engaged solely in carrying out purely state functions, although given the power to sue and be sued, has been recognized by the Federal courts as an entity distinct from the state itself for jurisdiction purposes. As a matter of fact, the consent to suit provision itself suggests state agency, as a distinct entity, whether under special or general laws would naturally have the ordinary rights of that character running to corporations or quasi-corporations.

[fol. 117] We feel, therefore, although it may be a close question, that in the face of the contract, the constitution and the statutes, which reflect the real situation of the contract work being performed under state regulation and control by one of its designated agencies, for the benefit of the state and its citizens generally, and paid for very largely by the people of the state through bond issues and taxation, that a simple clause which permits a state agency to sue or be sued, would be too narrow a thread upon which to [hand] the court's determination, that the principal party in interest in this suit is not the state, and that a more reasonable construction of this suability provision of the

statute would be, that the state had consented that it might be sued through its agency, the State Highway Commission, thereby probably giving the State courts jurisdiction of the suit. This process of reasoning necessarily leads to the conclusion that the suit here is in effect one against the State of Wyoming, and now the second question heretofore suggested presents itself, as to whether or not being a suit against the State, this court has jurisdiction of it.

This angle of the question counsel for the defendants have not discussed, either in their oral argument or in their trial briefs, and were the matter before an appellate court, the point may well have been considered as abandoned. However, for the purposes of this decision it cannot be entirely ignored by the court.

As before stated, this action so far as the jurisdiction of this court is concerned, is based upon the necessary amount being in controversy and the diversity of citizenship of the parties, but as stated in Postal Telegraph Cable Co. vs. Alabama, 155 U. S. 482, at page 487:

"A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different states; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States."

This doctrine is again reasserted as a basis of the Supreme Court's decision in the case of Minnesota vs. Northern Securities, 194 U. S. 48, at page 63. By the force of these decisions the necessary element of diversity of citizenship is swept out of this case, because with a citizen of another state as the plaintiff and the state itself in effect as the defendant, the State of Wyoming is not a citizen. [fol. 118] Nor does the evident waiving of immunity by the State *nu*der the Eleventh Amendment and thereby consenting that it may be sued through its agency in the premises seem to relieve the situation. The many cases in the books involving the jurisdiction of the United States courts over cases in which a state has been a party, do not seem to be analogous in their facts with the case at bar, although

it may be admitted that freely running passages in some of the opinions might seem to hold that a state by waiving its immunity under the Eleventh Amendment could be sued in the Federal district courts. A cursory reading of the language in Smith vs. Reeves, 178 U. S. 436, and Clark vs. Barnard, 108 U. S. 436, might seem to indicate as much. This language probably refers to cases in which the Federal courts have jurisdiction of the subject matter. However, it is certain that jurisdiction cannot be sustained upon the ground of diversity of citizenship, which is the jurisdictional ground named in the petition, in the view which this court takes of the nature of this suit. If it were to be sustained therefore upon any other jurisdictional ground it must needs be by virtue of some clause found in the statute defining this court's jurisdiction, as of course this is not a court of general, but of limited jurisdiction, having only such jurisdiction as is specifically delegated to it by Congress. Section 24 of the Judicial Code purports to specify the jurisdiction of the United States District Courts. While this section is subdivided into 25 sub-sections, the provision of sub-section number one would seem to apply only to the character of a controversy which is here before the court. It is there provided that in suits involving more than $3,000.00, exclusive of interest and costs, the district court has jurisdiction under three separate and distinct situations, to-wit: Where such a suit "(a) arises under the Constitution or laws of the United States, or treaties made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects." The situation here does not satisfy any of these requirements, considering the determination of the court that there is no diversity of citizenship in this case. If the cause involved a Federal question under clause (a) above, the Federal District Court might have jurisdiction where the state is a party. See Ames vs. Kansas, 111 U. S. 449, and Postal Telegraph Co. vs. Alabama, supra.

For the reasons stated, it must be held that the court has no jurisdiction of the case, and a final order and judgment may be entered dismissing it at the cost of the plaintiff, and reserving to plaintiff its proper exceptions.

[fol. 119] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING OF TRANSCRIPT—Filed March 7, 1927

Comes now the above named plaintiff and appellant and hereby elects to have the printing of the transcript in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

Dated this 7th day of Mar., A. D. 1927.

W. L. Walls, Attorney for Plaintiff.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 120 & 121] Appearances of counsel omitted in printing.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

ARGUMENT AND SUBMISSION—September 12, 1927

This cause having been called for hearing in its regular order, argument was commenced by Mr. Benjamin S. Crow for plaintiff in error, continued by Mr. Marion A. Kline for defendants in error and concluded by Mr. Benjamin S. Crow for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein, with leave to parties to file further briefs within five days.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER TERM, A. D. 1927

No. 7793

UTAH CONSTRUCTION COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE HIGHWAY COMMISSION OF WYOMING, Defendant in Error

In Error to the District Court of the United States for the District of Wyoming

OPINION—Filed Dec. 21, 1927

Prior to 1916 the State of Wyoming could not engage in any work of internal improvement unless authorized by a two-thirds vote of the people. In that year the constitution was amended, the amendment reading:

"The provision of section 6 of article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways, but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

Pursuant to this constitutional amendment the legislature in 1919 passed an Act creating a State Highway Department, now embodied in Wyoming Compiled Statutes 1920 as sections 3025-3037. We summarize the Act.

Section 3025 creates a State Highway Department to consist of a State Highway Commission and a State Highway [fol. 124] Superintendent. The commission consists of five commissioners to be first appointed by the Governor, with the advice and consent of the senate, and after stated periods to be elected biennially. The commission shall maintain offices in the State Capital to be in charge of the State Highway Superintendent; it shall have the power to sue in the name of "The State Highway Commission of

Wyoming," and may be sued by such name in any court upon any contract executed by it. The Attorney General shall be the legal adviser of the commission and shall prosecute and defend all actions in which the commission shall be a party or be interested. The commission shall have a seal bearing the words, "State Highway Commission of Wyoming, Official Seal."

Section 3026. The salary of the State Highway Superintendent, whom the commission appoints, shall be fixed by the commission and under the supervision of the commissioners he shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended, except on those highways constructed, improved or maintained in cooperation with the Secretary of Agriculture of the United States, under section 8 of the Act of Congress approved July 11, 1916 (39 Stat. 335), or other Federal Acts authorizing the use of Federal funds in the building of roads. With the approval of the commission the superintendent shall purchase all materials, supplies and equipments and shall employ such engineers and other employes as may be necessary for the proper performance of the duties of the commission in the construction of the work undertaken by it.

Section 3027. All road and bridge construction work, any part of the cost of which is paid from the State Highway Fund, shall be performed in accordance with plans and specifications prepared by the State Highway Superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the State Highway Superintendent shall have complete charge thereof, except on those highways constructed in cooperation with the Secretary of Agriculture under Acts of Congress. Improvements costing more than $2,000 shall be constructed upon contracts awarded to the lowest responsible bidder after public notice. Improvements costing less [fol. 125] than $2,000 may be constructed by the commission upon force account or upon contract awarded on public notice. The commission shall adopt general rules regulating the publication of notice to bidders and the awarding of contracts.

Section 3028. It is made the duty of the State Highway Commission from time to time to designate public highways to be known as State Highways, which may coincide, in whole or in part, with county roads theretofore legally established, and whenever such State Highways shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties and so much of the road and right of way as shall be so designated shall pass to and vest in the State of Wyoming. Rights of way not acquired from counties may be acquired by purchase or gift or by condemnation proceedings brought by the commission.

Section 3029. Except as to work on highways performed in co-operation with the Secretary of Agriculture of the United States, the construction and maintenance of all State Highways, including bridges and culverts thereon, shall be performed at the expense of the State and by and under the supervision of the commission and State Highway Superintendent.

Section 3030. The commission may cooperate with counties in the construction of county roads, bridges and culverts. All such cooperative work shall be performed under the control and supervision of the commission and the State Highway Superintendent in accordance with plans and specifications prepared by the Superintendent, but shall not be commenced until the county shall have entered into agreement with the commission to pay not less than one-half of the total cost of such work to the State and the entire cost of maintaining said highway thereafter.

Section 3031. The State assents to the provisions of the Act of Congress approved July 11, 1916, and to amendatory Acts granting Federal aid to States in the construction and improvement of public roads, and the State Highway Commission is authorized to enter into all contracts and agreements with the United States for that purpose. The good faith of the State is pledged to provide its share of the funds for construction and maintenance. The com- [fol. 126] mission is authorized to cooperate with the Secretary of Agriculture for that purpose. Where the road to be improved is a State Highway the State's share of the expense shall be borne entirely by the State. If a county highway the county must pay into the State Highway Fund

its share of the estimated cost and bind itself to pay all subsequent maintenance.

Section 3032. It is made the duty of the State Highway Superintendent to compile all available information relative to public roads and bridges within the State and to prepare standard plans and specifications for the construction of roads, culverts and bridges. He may call upon the boards of county commissioners for assistance in gathering the necessary data.

Section 3033. The State Highway Superintendent shall make annual reports to the commission of the transactions of the department, and the commission shall make reports to the Governor biennially.

Section 3034. A State Highway Fund is created, to be in the custody and keeping of the State Treasurer. He shall place to its credit all amounts theretofore or thereafter received from the United States under said Act of Congress, all moneys derived from taxes levied for the purpose of or appropriated for said fund, all moneys received from the sale of State bonds for highway construction or improvement, all moneys received from counties under cooperative agreements provided for in the act, and all moneys from any source by donations or otherwise intended for highway improvement. All moneys so credited to said fund by the State Treasurer are made available without further appropriation, but no warrant shall be drawn thereon except on voucher approved by the State Highway Superintendent.

Section 3035. $300,000 is appropriated to the State Highway Fund out of moneys in the State Treasury not otherwise appropriated, and made available upon the passage of the Act, and an additional sum of $300,000 is made available on March 1, 1920, for road purposes out of public funds then in the State Treasury not otherwise appropriated.

The two remaining sections are not material.

[fol. 127] After this writ of error was sued out, but before the cause was submitted here, the State legislature amended

section 3025 so that the part of it providing for suits by and against the commission reads thus:

"The commission shall have the power to sue in the name of 'The State Highway Commission of Wyoming' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it."

In the spring of 1922 the commission decided to construct a State Highway known as the Wind River Canyon Road, which was a Federal Aid project. Bids were taken, and the bids of plaintiff in error for the construction of sections B, C and D were accepted. These sections cover 13.42 miles of the road extending from Boysen Dam to the bridge in Thermopolis. Plans and specifications were submitted to the bidders. On June 1, 1922, a contract with plaintiff in error was entered into pursuant to its bid. In that contract the State of Wyoming is named as party of the first part and Utah Construction Company, a Utah corporation, as party of the second part. The first paragraph of the contract is in these words:

"This agreement made and entered into this 1st day of June, 1922, between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the Contractor."

The contractor agreed to do all work and furnish all labor, material, etc., necessary to construct in good workmanlike and substantial manner and to the satisfaction of the State Highway Engineer the portion of the Wind River Canyon Road State Highway from Boysen Dam to bridge south of Thermopolis under the direct supervision of the State Highway Commission, subject to inspection at all times and approval by the Secretary of Agriculture pursuant to the provisions of the Act of Congress, and in full compliance with the attached plans and specifications, which were made a part of the contract. "In consideration therefor the State of Wyoming shall pay and the Contractor shall receive and accept as its full compensation under the contract the prices stipulated in the proposal" of the contractor, which was the contractor's bid. The contractor [fol. 128] made separate bids in the form of proposals to

the State Highway Commission for the construction of each of the three sections, and in each the bid was expressed in unit prices for the different kinds of work to be done, that is, the bid for each section was made on the basis of so many cents per cubic yard for different kinds of excavation and fills, so much per cubic yard for dry rubble masonry, so much per lineal foot for culverts, etc. No gross amount was named as the bid on either section, and it was agreed that the amount of work of different kinds to be done on the different sections, as stated in the specifications, was only an estimate. Returning to the terms of the contract of June first, it provides a basis for liquidating damages, if any, that might be sustained by the State of Wyoming, and it was agreed that the contractor should make payment thereof to the State of Wyoming. Monthly payments based upon approximate estimate of the amount of work done during the preceding month, were to be computed by the engineer and made to the contractor, and within a reasonable time after the acceptance of the work the State Highway Engineer was required to certify to the commission a final estimate based upon the quantities measured by the engineer and computed according to the unit prices in the contractor's proposals, which were attached to the contract as a part thereof. This would show, as the contract recited, the total work done and the amount due the contractor therefor, after all previous payments and any other amounts retained under the provision of the contract were deducted. It provided that the State Highway Commission might require the contractor to show to its satisfaction that it had discharged all of its debts for labor, material used or amounts due sub-contractors on the work. All prior partial estimates and payments were subject to correction in the final estimate and payment. The advertisement, proposal, bond of the contractor, plans and specifications attached to the contract or referred to in it were declared to be a part of the contract. The concluding paragraph of the contract is in these words:

"In Witness Whereof, the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party

of the second part, has caused these presents to be exe-
[fol. 129] cuted and has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922.

State Highway Commission of Wyoming, by L. E. Laird, Superintendent. (Seal.) Attest: Z. E. Sevison, Secretary. The Utah Construction Company, by W. H. Wattis, President. (Seal.) Attest: Warren L. Wattis, Secretary."

Later a supplemental agreement was made. It was signed in the same way and by the same parties as was the agreement of June first. The first paragraph of the supplemental agreement reads thus:

"Supplementing the contract entered into the 1st day of June, 1922, between the State Highway Commission of Wyoming, and The Utah Construction Company for the construction of the Wind River Canyon road in Fremont and Hot Springs Counties, being Sections B, C and D of Federal Aid Project No. 118, the following facts and conditions are hereby mutually agreed to:"

This supplemental agreement was executed about December 12, 1922. It extended the time for completion of the work by the contractor. It recited:

"In the final location and staking out of Sections B and C, it was found desirable and advantageous to make certain changes in grades and alignments from those shown on the original plans, which changes had been anticipated by both parties, at the time of executing the contract, but the quantities involved were unknown at that time."

It substituted cement rubble masonry head walls in lieu of concrete head walls; it stated that tunnel excavation had been increased to approximately 882 lineal feet, the amount in the original contract being less than half that length; it stated that on account of increased quantities of excavation the contract could not be completed on April 1, 1923; the contractor agreed to an increased quantity of unclassi-
[fol. 130] fied excavation on Section B of approximately 30,000 cubic yards and to perform the same at the contract price called for in the original contract, to an increased

quantity of unclassified excavation on Section C of approximately 100,000 cubic yards and to perform the same at the unit price called for in the original contract, to construct the cement rubble masonry head walls at a unit price of $14 per cubic yard and to complete the increased amount of tunnel excavation at the contract unit price of $70 per lineal foot; and the State Highway Commission on its part agreed that the contractor might waste material from cuts and borrow material outside of the staked cross-sections for fills in order to permit the use of steam shovels for rough grading; and there is a proviso as to the basis of payment for work done in that way.

There is sharp controversy as to whether the State of Wyoming or the State Highway Commission was a party to the contract, and as bearing on that question we now note some of the clauses of the specifications, which are made a part of the contract. The specifications, in their definition of terms, say that "Contract" means "The agreement between the contractor and the State Highway Commission covering the work to be performed and including the plans and specifications." They provide that each bidder must accompany his bid by money deposit equal to two per centum of the amount of the proposal in the form of cash, a draft, or a certified check payable to the State Highway Commission of Wyoming, and in case of his failure to enter into the contract and furnish the required bond the bidder's deposit shall become a donation to the State Highway Fund. The specifications provide in one part that the State Highway Commission may enter upon the performance of the work if the contractor fails, and in another part that the State of Wyoming may enter for the purpose of doing the work necessary to complete the contract.

Plaintiff in error brought this suit, alleging in the first count of its complaint a breach of the contract by defendant and resulting damages to it in a very large amount, for which it asked judgment. The breach, as alleged, consisted in a change of the line of the road through two of the sections; that is, a new survey for those two sections, which moved the road to be constructed back from the [fol. 131] shore line of the river on to righer ground. Plaintiff was there at the time engaged in construction

work, but it thought the changes were only those referred to in the supplemental contract. The work was thus made more difficult and costly to plaintiff. The second cause of action alleged full performance by plaintiff, that the engineer and defendant found the total amount for the work to be $511,953.38, of which $88,773.81 has not been paid, and judgment is prayed for that amount. The commission demurred to the complaint, on the ground that the suit was against the State of Wyoming and for that reason the court was without jurisdiction; also on the ground that the first count did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the commission answered. It denied the allegations charging it with a breach of the contract, and alleged that it was understood at the time plaintiff made its bid and the contract was entered into that the route of the road was to be changed through two sections, that a new survey was made for that purpose and the change made while plaintiff was engaged upon the work, that it had full knowledge of the change and agreed thereto. The answer alleged that with full knowledge of the changes that were made plaintiff proceeded with the work and was paid on estimates at the unit prices called for by the contract, and the plaintiff at no time prior to the completion of the building of the road made any objection or protest that it was being required to do work not called for by the contract. To this answer plaintiff replied. It admitted that it made no protest over the change in the survey until after the road was substaintially completed, but alleged that it did not discover the change before that time and that it received payments as the work progressed without knowledge that it had constructed the road along an entirely new survey. We have not attempted to give in full the allegations of the pleadings but only sufficient to disclose the nature of the controversy. After plaintiff's reply came in the defendant renewed its demurrer, which was sustained and the complaint dismissed. The assignments challenge that ruling as error.

Mr. Benjamin S. Crow (Mr. John W. Lacey, Mr. Herbert V. Lacey, and Mr. W. L. Walls were with him on the brief), for plaintiff in error.

[fol. 132] Mr. Marion A. Kline (Mr. William O. Wilson, Mr. James A. Greenwood and Mr. John Dillon were with him on the brief), for defendant in error.

Before Lewis, Circuit Judge, and Pollock and Scott, District Judges

LEWIS, Circuit Judge, after stating the facts as above, delivered the opinion of the Court:

The learned district judge in finally sustaining the demurrer expressed his reasons in a written opinion. Following the rule announced on the subject in ex parte State of New York, 256 U. S. 490, and other cases, the conclusion was reached that the suit was in reality against the State; and that being so, the jurisdiction alleged, diverse citizenship, did not exist—because the State is not a citizen. Postal Tele. Cable Co. v. Alabama, 155 U. S. 482; Minnesota v. Northern Securities, 194 U. S. 48; Hertz v. Knudson, 6 F. (2d) 812; and Chicago R. I. & P. Ry. Co. v. State of Nebraska, 251 Fed. 279. Furthermore, it was thought that even if the statute authorizing suits against the State Highway Commission should be taken as a waiver of the State's immunity granted by the Eleventh Amendment, still that would not confer jurisdiction where it appeared from the complaint the court was without jurisdiction. Obviously, both conclusions rest on the premise that the suit against the commission is a suit against the State.

Primarily the commission could not be sued at law unless it be a party to the contract. Barring equitable innovations, with which we are not now concerned, Anson on Contracts, 2nd Am. Ed., page 459, says:

"• • • the rule is best expressed in the words of Parke, B., in Beckham v. Drake, 9 M. & W. 95, 'those only can sue or be sued upon an indenture who are named or described in it as parties.' "

Looking only to the contract of June 1, 1922, it would be difficult to say that the commission was a party to it and liable to suit for its breach. Apparently it signed the contract in its own right and behalf, but the obligation to pay for the work was expressly imposed on the State, and the [fol. 133] State, not the commission, was named as a party

to it. But for the supplemental agreement we would be constrained to say the commission could not be sued. But we observe in the later agreement the parties here declared over their signatures that the agreement of June first was a contract between the State Highway Commission of Wyoming and the Utah Construction Company. That statement is rather borne out by excerpts from the specifications and is in harmony with the statute itself which authorizes the commission to make such contracts. The statute made it a legal entity for that purpose, imposed on it the duty of initiating the improvement, to supervise its construction and to make settlements with the contractor.

We are not impressed with the soundness of the contention that the suit is in reality one against the State. Plaintiff seeks no relief against it, nor interference with its property, rights or functions. The commission is the sole defendant, it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. In that event it will be entirely optional with the State as to what, if anything, it will do in the premises. It will not be legally bound. But if the court has jurisdiction the controversy between the parties to the contract will be finally adjudicated, and that seems to be the limit of our present inquiry. Port of Seattle v. Oregon & W. R. R., 255 U. S. 56, 71.

The complaint distinctly alleges that each member of the commission is a resident and citizen of the State of Wyoming. We think there can be no doubt the commission is suable as such and that the Federal court had jurisdiction because of diverse citizenship. Seemingly the identical inquiry was answered in Thomas v. Board of Trustees, 195 U. S. 207, 218: "* * * as the Board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the Circuit Court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the Board before the court as defendants, provided the bill had contained the additional allegation that each individual Trustee was a citizen of Ohio." It hardly need be said that the members of the commission would not be personally liable, had they been made parties; because their acts were official, [fol. 134] and not of a personal character. Hodgson v. Dex-

ter, I Cranch 345, 363; Belknap v. Schild, 161 U. S. 10, 17; Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corporation, 295 Fed. 415, 417.

The demurrer did not challenge the second cause of action on the ground that it did not state sufficient facts; and the trial court expressed no opinion in its written memorandum on that issue as to the first cause of action. We see no cause to doubt the sufficiency of the second count as a pleading, and, as said, it was not challenged; as to the first count we leave that for the present to the court below.

Reversed with directions to set aside the order dismissing the complaint.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed Dec. 21, 1927

SCOTT, District Judge, dissenting:

I regret that I am unable to concur with the majority of the Court in its opinion sustaining the jurisdiction of the District Court. I am constrained to the conclusion that the State Highway Commission of Wyoming is not a corporation. The act of the Wyoming legislature creating the Board does not purport to create a corporation, but in my opinion a mere Commission to which is committed the execution of particularly described duties. It is designed to hold no title to property. It can have no financial interests of any character, and neither it nor its members are in any true sense trustees. The State legislation respecting this body, as well as the Act of Congress known as The Federal Highway Act, seems to contemplate mutual transactions between the National Government and States. In my opinion the case was one essentially against the State of Wyoming. The case was an action at law to recover a money judgment for increased compensation for construction of the highway, and alleged to have been occasioned by a change of survey. It is conceded in the majority opinion that the State Highway Commission of Wyoming has nothing from which the judgment could be paid, and it is likewise conceded that the plaintiff can recover nothing from [fol. 135] the individual members of the Board. It is fur-

ther conceded that in the event of recovery "it will be entirely optional with the States as to what, if anything, it will do in the premises." It seems to me that such an adjudication would be a mere gesture.

The case of Port of Seattle v. Oregon & W. R. R., 255 U. S. 56, cited in the majority opinion, seems to me to be clearly distinguishable. In that case the Port of Seattle was expressly created as a Municipal Corporation, and was empowered to hold property and receive revenue in its own legal right. As the Supreme Court there said:

"The Port has thus an independent financial interest in this controversy; and although the State has also an interest, suit against the Port would not be prevented by the Eleventh Amendment."

I also think the case of Thomas v. Board of Trustees, 195 U. S. 207, also cited in the majority opinion, clearly distinguishable. In that case while it was held that the bill did not allege facts showing the incorporation of the Board, the bill did disclose that the Board was in reality a Board of trustees, "and to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gifts, devise or bequest, moneys, lands and other properties for its benefit and for the benefit of those under its charge, etc." Had the necessary diversity of citizenship been alleged and the individual members of the Board been named as defendants as in the instant case, the opinion of the Supreme Court to my mind indicates that the Circuit Court would have had jurisdiction. Indeed, the answers of the Supreme Court were certified with liberty to the Circuit Court of Appeals to authorize an amendment of the bill alleging the necessary diversity of citizenship of the individual members. With the appropriate amendment, I have no doubt that in that case, as well as in the Port of Seattle case, the Court would have had jurisdiction to finally adjudicate the rights in question, and grant complete equitable or legal relief in accordance with the class of the respective cases.

I think the principle laid down in Ex Parte State of New York, No. 1, 256 U. S. 490, and Smith v. Reeves, 178 U. S. 436, is applicable to the case at bar, and that the action here was merely one against the State Highway Commis-

sion and its individual members as such. A brief interesting note will be found on the subject in 44 L. R. A. (N. S.) [fol. 136] at page 196. I quote from the note:

"In some of the cases the state agency or board is itself a corporation with general power to sue and be sued. In other cases the result in the main seems to depend upon the nature of the action or relief demanded. Thus, in the Lord case, infra, it was a question of obtaining money out of the state treasury." * * * "In Lord & P. Chemical Co. v. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032, it was held that an action would not lie against the board of agriculture, its commissioner, and the state treasurer to recover taxes paid under protest to it, and turned over it seems to the state treasurer, as the board was a department of the government, and that the action was an action against the state."

There is another serious question going to the jurisdiction of a Federal Court. The legislature of the State of Wyoming in amending the original act provided:

"The commission shall have the power to sue in the name of 'The State Highway Commission of Wyoming' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it."

The case of Smith v. Reeves, supra, was one brought by an individual against Reeves as State Treasurer of California. Section 3669 of the Political Code of California provided in case of actions against the State Treasurer for the recovery of taxes illegally collected that "at the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento." It was contended in that case that by the section referred to the State had consented that its Treasurer might be sued in respect to the matters specified. Mr. Justice Harlan, in delivering the opinion of the Court, said:

"It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it

has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayers shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the County of Sacramento,' indicate [fol. 137] that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the Treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value; for, as the jurisdiction and authority of a Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it and to proceed to final decree, nor could it, merely in obedience to the laws of the State, transfer it to a state court upon the demand of the State Treasurer. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States.

"In Beers v. Arkansas, above cited, it was further said: 'As this permission (to be sued) is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suits might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objections would have been made to it. The objection is that it was passed after the suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that

these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, [fol. 138] if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.' "

Now the question occurs, if a State restricts its suability or the suability of its Treasurer or other officer as such, why may it not likewise restrict the suability of its Commission from whom it has withheld corporate capacity?

I think the judgment of the District Court should have been affirmed.

[fol. 139] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 7793

UTAH CONSTRUCTION COMPANY, a Corporation, Plaintiff in Error,

vs.

THE STATE HIGHWAY COMMISSION OF WYOMING, Consisting of Hyrum Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder, and Francis Johnstone

In error to the District Court of the United States for the District of Wyoming

JUDGMENT—Dec. 21, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming, and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Utah Construction Company, a Corporation, have and recover against The State Highway Commission of Wyoming, Consisting of Hyrum Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder, and Francis Johnstone, the sum of———— Dollars for its costs in this behalf expended, to be collected according to law.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to set aside the order dismissing the complaint.

[fol. 140] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 141] In Supreme Court of the United States

Order Allowing Certiorari—Filed April 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,304. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 96. The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, et al., petitioner, v. Utah Construction Company. Petition for a writ of certiorari and exhibit thereto. Filed March 20th, 1928. (33,304.)

FILE COPY

FILED
MAR 20 1928
CHARLES ELMORE CROPLEY
CLERK

In the
Supreme Court of the United States

October Term, 1927

No. 852 96

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

PETITION FOR CERTIORARI

BRIEF ACCOMPANYING PETITION

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WYOMING LABOR JOURNAL, CHEYENNE

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In the Supreme Court of the United States

October Term, 1927

No.....

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

Petition for Writ of Certiorari.

To the Honorable The Supreme Court of the United States:

The petition of The State Highway Commission of Wyoming respectfully shows:

1. That on May 13th, 1925, the Utah Construction Company filed in the United States District Court for the District of Wyoming its petition against The State Highway Commission of Wyoming, your petitioner, in which said petition it sought to recover from your petitioner the sum of $544,827.74, which sum it alleged to be due upon two causes of action. In its first cause of action it sought to recover

$456,053.93 as damages for an alleged breach of a certain contract for the building of a portion of the Wind River Canyon State Highway; and in its second cause of action it sought to recover $88,773.81, which sum it alleged to be due and unpaid on estimates furnished by the State Highway Engineer for work done and performed under said contract. (Record—Pages 4-74.)

2. In said action the jurisdiction of the Federal Court was based upon an alleged diversity of citizenship, concerning which the petition contained the following allegations:

> "That the said Hyram Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney are respectively the duly appointed, qualified and acting Highway Commissioners of the State of Wyoming, and that collectively the said persons above named constitute the State Highway Commission of Wyoming with power to sue and be sued under the provision of the statute of Wyoming in such case made and provided. That the said persons constituting the said State Highway Commission of Wyoming, and the said Commission is each a resident and citizen of the State of Wyoming."
>
> (Record—Page 4)

3. Your petitioner first by demurrer and afterward by answer challenged the jurisdiction of the District Court on the ground that the suit was in reality a suit against the State of Wyoming by a citizen and resident of the State of Utah, and that therefore, under the Federal Constitution and Statutes, the Federal Courts were without jurisdiction. The District Court on final hearing sustained this contention, held that it was without jurisdiction because the suit was in reality a suit against the State of Wyoming, and

thereupon entered an order dismissing plaintiff's petition. The decision of the District Court is reported in 16 Fed. (2nd) at Page 322, and appears here at Page 110 of the Record.

4. In due time the respondent appealed the case to the Circuit Court of Appeals of the Eighth Circuit, which, in an opinion by a divided court, reversed the decision of the District Court and held that the action was against The State Highway Commission of Wyoming and not against the State of Wyoming itself, and that the Federal Courts had jurisdiction. (Record—Page 121.)

Statement of Facts.

And your petitioner respectfully shows that the facts upon which it bases its claim that this action is an action against the State of Wyoming and therefore is not within the jurisdiction of the Federal Courts, are as follows:

1. That prior to the year 1916 the State of Wyoming was not authorized to engage in any work of internal improvements unless the proposition to make such improvement was first submitted to and authorized by a two-thirds vote of the people. In that year its Constitution was amended so as to permit the State to engage in the work of constructing public roads and highways.

2. That in the year 1919 the Legislature of the State of Wyoming, for the purpose of putting into effect said constitutional amendment, passed an Act known as the State Highway Act, now Sections 3025 to 3037 of the Wyoming Compiled Statutes, 1920. This Act provides (1) for a "State Highway Department to consist of a State Highway Commission and a State Highway Superintendent";

(2) that the "State Highway Commission shall consist of five State Highway Commissioners, who shall be appointed by the Governor with the advice and consent of the Senate"; (3) that the "Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name in any court upon any contract executed by it"; (4) that the Attorney General shall be the legal adviser of said Commission; (5) that the Commission shall maintain offices in the State Capitol Building in charge of the State Highway Superintendent; (6) *that there shall be created a "State Highway Fund", in the possession and under the control of the State Treasurer, who shall place to its credit all moneys paid to the State of Wyoming by the United States to assist in the building of public highways, all moneys received from the sale of State bonds for highway construction or improvement, all moneys derived from State taxes levied for highway purposes,* etc.; (7) *that the moneys in said State Highway Fund shall not be paid out except by warrants issued by the State Auditor on vouchers approved by the State Highway Superintendent;* (8) *that the title to the lands over which any State Highway may be built,* including the road-bed and right-of-way, *shall vest in the State of Wyoming;* and (9) that *the construction and maintenance of all State Highways,* including bridges and culverts thereon, *shall be performed at the expense of the State* and by and under the supervision of the Commission and the State Highway Superintendent. The Act also appropriated a certain sum out of the general funds in the State Treasury for such highway work, and additional sums have been appropriated by each succeeding Legislature. In 1927 the Legislature changed the provisions of (3) supra so that it now provides that the Commission may be sued in the Courts of the State of Wyoming and in no other jurisdiction.

It will thus be seen that the Legislature has specifically provided that the construction of all State Highways is to be paid for out of a State Highway Fund, consisting of moneys raised by State taxes and the sale of State bonds or appropriations made by the Legislature out of the general fund, and that the expense of construction of all such highways shall be paid by the State of Wyoming; and that the State Highway Commission in awarding contracts for the building of State Highways and in supervising their construction, acts merely as an alter ego of the State,—a body which the State has created and designated to do that particular portion of the work of the State. (True and correct copies of said constitutional amendment and of said State Highway Act are annexed to and made a part of petitioner's brief filed herewith, and the same are hereby referred to for further particulars.)

3. While these Statutes were in full force and effect the State Highway Department, in the spring of 1922, determined to construct a State Highway through the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming. Said Highway was to be built in co-operation with the United States Government, and is designated in the advertisement for bids and in the contract sued on in this action as the "Wind River Canyon Road State Highway",—"Federal Aid Project No. 118". Bids were called for, and the respondent, Utah Construction Company, being the lowest bidder for the construction of Sections B, C and D of said State Highway, its bid was accepted. (Record—Pages 61-68)

4. Thereafter, on June 1st, 1922, a contract was entered into with the respondent for the doing of said construction work. (Record—Pages 68-72) The first paragraph of said contract is most significant and reads as follows:

> "This Agreement, made and entered into this 1st day of June, 1922, between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the contractor."

In said contract it was further provided that the road to be built was a portion of the Wind River Canyon Road State Highway; that the work was to be done to the satisfaction of the State Highway Engineer; that when the work of building said road had been completed the State of Wyoming should pay, and the contractor should receive, as full compensation for everything furnished and done under the contract the unit prices stipulated in the proposal; and that in the event of a breach of the contract by the contractor, it should pay to the State of Wyoming a certain amount as liquidated damages. The contract also contains many other provisions showing that the State of Wyoming is a party thereto. The testimonium clause is as follows:

> "In Witness Whereof, *The State of Wyoming,* acting through its State Highway Commission, *party of the first part,* has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part, has caused these presents to be executed and has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922."
>
> (Record—Page 71)

5. It was further provided in said contract that the advertisement for bids, proposals, plans, specifications, etc. should be considered as a part of said contract, and these latter also contain many provisions showing that the State of Wyoming is the real party in interest and the party that was building said road. (Record—Pages 14, 25, 63, 65, 68 etc.)

6. After the above contract had been duly executed by the parties thereto, the respondent, Utah Construction Company, began the work of building said State Highway, and in due time completed the same. In December, 1922, a supplemental agreement was entered into. (Record—Page 72) This supplemental agreement is very short, and provides for certain changes in grades and alignments, and for the doing of a large amount of additional excavation, tunnel work, etc. at the unit prices mentioned in the original contract. It also provides for the extension of time within which to complete the work. *But said supplemental agreement does not in any way change, alter or modify any of the provisions of the original contract referred to in the preceding paragraphs of this petition.*

7. During the progress of the work the Utah Construction Company, in accordance with the provisions of the Statute hereinbefore referred to, filed each month its sworn vouchers for work done, which were approved by the State Highway Superintendent. Warrants were drawn by the State Auditor for the amount of these vouchers, and these warrants were paid by the State Treasurer out of moneys in the State Highway Fund. When the road was finally completed it presented a claim for extra work, which the State Highway Superintendent refused to pay, and thereupon it filed suit upon the contract as above stated.

Contentions of Your Petitioner.

It was the contention of your petitioner in the lower courts, and it is its contention in this Court, that although your petitioner is named as the party defendant in said action, the State of Wyoming is the real party to this controversy, and that the provisions of the contract hereinabove referred to, which is made a part of plaintiff's petition, when read in connection with the law creating the State Highway Department, demonstrate conclusively that the State of Wyoming and not the State Highway Commission is the real party to the above contract and the only party that can be sued thereon; that the State Highway Commission is merely an arm or agency of the State of Wyoming, having supervision of the letting of the contracts for State Highways, and that any action upon said contract was and is an action against the State of Wyoming.

Reasons Why a Writ of Certiorari Should be Granted.

Your petitioner is advised and so believes, that under the facts and the law of this case the findings and judgment of the Circuit Court of Appeals of the Eighth Circuit, reversing the judgment of the District Court and holding that this suit is not a suit against the State of Wyoming, are erroneous and are in violation of the rules, decisions and principles of law as laid down by this Honorable Court, and that this Honorable Court should require said case to be certified to it for its review and determination under and in accordance with the provisions of the Acts of Congress in such cases made and provided, for the following reasons:

(1) Because the findings and judgment of said Circuit Court of Appeals of the Eighth Circuit are in direct conflict with the holdings and decisions of this Honorable Court in the cases of Hagood vs. Southern, 117 U. S. 52; Ex parte Ayers, 123 U. S. 443; Smith vs. Reeves, 178 U. S. 436; Murray vs. Distilling Company, 213 U. S. 151, and other cases cited in petitioner's brief filed herewith, each and all of which said cases hold that the Court must look through form to substance in an action brought against state officers or state agencies to determine whether or not the State is the real party defendant, even where the State is not actually named as a party to the record, and that if upon investigation it appears that the action is in reality an action against a sovereign state, then the Federal Courts are without jurisdiction, save and except in those special cases where federal questions are involved.

(2) Because the findings and decision of the Circuit Court of Appeals of the Eighth Circuit in the case at bar were and are in direct conflict with the decisions of this Honorable Court in the cases of Hodgson vs. Dexter, 1 Cranch 345; Belknap vs. Schild, 161 U. S. 10, and other cases cited in accompanying brief, each and all of which hold that where a public agent acts in the line of his duty and under legal authority, he is not individually responsible on any contracts that he may make in that capacity.

(3) Because said Circuit Court of Appeals in its decision refused to give any force or effect to the amendment to the State Highway Act passed by the Wyoming State Legislature in 1927, and such action and the decision of said Circuit Court of Appeals are in direct conflict with the decisions of this Honorable Court in Beers vs. Arkansas, 50 How. 527; In re Ayers, 123 U. S. 443, and other cases referred to in the accompanying brief.

(4) Because the decision of the Circuit Court of Appeals purports to be based upon certain decisions of this Honorable Court, which said decisions are not applicable to the facts of this case, as is pointed out in the dissenting opinion of Judge Scott.

(5) Because the decision of said Circuit Court of Appeals decides an important question of local law, a question in which the State of Wyoming is vitally interested, in a way that is in direct conflict with the decisions of the Wyoming Supreme Court in Hjorth Royalty Company vs. Trustees of University, 30 Wyo. 309, and Franzen vs. Southern Surety Company, 35 Wyo. 15. In the former case the Wyoming Supreme Court holds that, "a suit against a department of the State Government or a board or corporation created by the State for governmental purposes, is a suit against the State", and in the latter case it holds that the State Highway Commission is one of the departments of the State itself and that its contracts are the contracts of the State of Wyoming.

(6) Because the decision of the Circiut Court of Appeals reversing the United States District Court for the District of Wyoming was by a divided court, Scott, District Judge, writing a strong dissenting opinion in favor of affirming said judgment; that as the matter now stands one United States Circuit Judge and one United States District Judge have held that the action in the case at bar is not an action against the State of Wyoming, but against the State Highway Commission of Wyoming, and therefore the federal courts have jurisdiction; while on the other hand two United States District Judges have held that the action is an action against the State of Wyoming, and therefore the federal courts were and are without jurisdiction.

(7) Because the majority opinion of said Circuit Court of Appeals is self contradictory, as appears upon the face of said opinion.

(8) Because the decision of said Circuit Court of Appeals would require the United States District Court for the District of Wyoming to take jurisdiction of a case and to try an action against a nominal defendant which said Court in its opinion concedes "has no property, no power of taxation, no means of discharging a judgment should one be recovered against it". (Record—Page 131) Lex nil facit frustra. Lex neminen cogit ad vana seu inutilia.

(9) In addition to the above grounds your petitioner would also respectfully call the attention of this Honorable Court to the fact that plaintiff's petition does not state a cause of action against petitioner; that the acts therein complained of are not the acts and doings of your petitioner or any of its authorized agents, nor does the plaintiff in its prayer for relief ask for any judgment against your petitioner.

Your petitioner appends hereto its brief in support of this petition, in which each and all of the foregoing matters are more fully set forth and discussed.

Your petitioner believes that in no way can it more clearly show the errors and rulings here complained of than by setting forth the majority and minority opinions of the Circuit Court of Appeals, and as both are very short, omitting the introductory part, they are here set forth in full, and are as follows:

"Lewis, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.

"The learned district judge in finally sustaining the demurrer expressed his reasons in a written opinion. Following the rule announced on the subject in Ex parte State of

New York, 256 U. S. 490, and other cases, the conclusion was reached that the suit was in reality against the State; and that being so, the jurisdiction alleged, diverse citizenship, did not exist,—because the State is not a citizen. Postal Tele. Cable Co. vs. Alabama, 155 U. S. 482; Minnesota vs. Northern Securities, 194 U. S. 48; Hertz vs. Knudson, 6 F. (2d) 812; and Chicago R. I. & P. Ry. Co. vs. State of Nebraska, 251 Fed. 279. Furthermore, it was thought that even if the statute authorizing suits against the State Highway Commission should be taken as a waiver of the State's immunity granted by the Eleventh Amendment, still that would not confer jurisdiction where it appeared from the complaint the court was without jurisdiction. Obviously, both conclusions rest on the premise that the suit against the commission is a suit against the State.

"Primarily the commission could not be sued at law unless it be a party to the contract. Barring equitable innovations, with which we are not now concerned, Anson on Contracts, 2nd Am. Ed., page 459, says:

> '* * * the rule is best expressed in the words of Parke, B., in Beckham vs. Drake, 9 M. & W. 95, 'those only can sue or be sued upon an indenture who are named or described in it as parties.'

"Looking only to the contract of June 1, 1922, it would be difficult to say that the commission was a party to it and liable to suit for its breach. Apparently it signed the contract in its own right and behalf, but the obligation to pay for the work was expressly imposed on the State, and the State, not the commission, was named as a party to it. But for the supplemental agreement we would be constrained to say the commission could not be sued. But we observe in the later agreement the parties here declared over their signatures that the agreement of June first was a contract be-

tween the State Highway Commission of Wyoming and the Utah Construction Company. That statement is rather borne out by excerpts from the specifications and is in harmony with the statute itself which authorizes the commission to make such contracts. The statute made it a legal entity for that purpose, imposed on it the duty of initiating the improvement, to supervise its construction and to make settlements with the contractor.

"We are not impressed with the soundness of the contention that the suit is in reality one against the State. Plaintiff seeks no relief against it, nor interference with its property, rights or functions. The commission is the sole defendant, it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. In that event it will be entirely optional with the State as to what, if anything, it will do in the premises. It will not be legally bound. But if the court has jurisdiction the controversy between the parties to the contract will be finally adjudicated, and that seems to be the limit of our present inquiry. Port of Seattle vs. Oregon & W. R. R., 255 U. S. 56, 71.

"The complaint distinctly alleges that each member of the commission is a resident and citizen of the State of Wyoming. We think there can be no doubt the commission is suable as such and that the Federal court had jurisdiction because of diverse citizenship. Seemingly the identical inquiry was answered in Thomas vs. Board of Trustees, 195 U. S. 207, 218; '* * * as the Board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the Circuit Court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the Board before the court as defendants, provided the bill had contained

the additional allegation that each individual Trustee was a citizen of Ohio.' It hardly need be said that the members of the commission would not be personally liable, had they been made parties; because their acts were official, and not of a personal character. Hodgson vs. Dexter, 1 Cranch 345, 363; Belknap vs. Schild, 161 U. S. 10, 17; Astoria Marine Iron Works vs. United States Shipping Board Emergency Fleet Corporation, 295 Fed. 415, 417.

"The demurrer did not challenge the second cause of action on the ground that it did not state sufficient facts; and the trial court expressed no opinion in its written memorandum on that issue as to the first cause of action. We see no cause to doubt the sufficiency of the second count as a pleading, and, as said, it was not challenged; as to the first count we leave that for the present to the court below.

"Reversed with directions to set aside the order dismissing the complaint.

"Filed December 21, 1927.

"Scott, District Judge, dissenting:

"I regret that I am unable to concur with the majority of the Court in its opinion sustaining the jurisdiction of the District Court. I am constrained to the conclusion that the State Highway Commission of Wyoming is not a corporation. The act of the Wyoming legislature creating the Board does not purport to create a corporation, but in my opinion a mere Commission to which is committed the execution of particularly described duties. It is designed to hold no title to property. It can have no financial interests of any character, and neither it nor its members are in any true sense trustees. The state legislation respecting this body, as well as the Act of Congress known as The Federal Highway Act, seems to contemplate mutual transactions between the National Government and States. In my opinion the case was one essentially against the State of Wyo-

ming. The case was an action at law to recover a money judgment for increased compensation for construction of the highway, and alleged to have been occasioned by a change of survey. It is conceded in the majority opinion that the State Highway Commission of Wyoming has nothing from which the judgment could be paid, and it is likewise conceded that the plaintiff can recover nothing from the individual members of the Board. It is further conceded that in the event of recovery 'it will be entirely optional with the State as to what, if anything, it will do in the premises.' It seems to me that such an adjudication would be a mere gesture.

"The case of Port of Seattle vs. Oregon & W. R. R., 255 U. S. 56, cited in the majority opinion, seems to me to be clearly distinguishable. In that case the Port of Seattle was expressly created as a Municipal Corporation, and was empowered to hold property and receive revenue in its own legal right. As the Supreme Court there said: 'The Port has thus an independent financial interest in this controversy; and although the State has also an interest, suit against the Port would not be prevented by the Eleventh Amendment.'

"I also think the case of Thomas vs. Board of Trustees, 195 U. S. 207, also cited in the majority opinion, clearly distinguishable. In that case while it was held that the bill did not allege facts showing the incorporation of the Board, the bill did disclose that the Board was in reality a board of trustees, 'and to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gift, devise or bequest, moneys, lands and other properties for its benefit and for the benefit of those under its charge, etc.' Had the necessary diversity of citizenship been alleged and the individual members of the Board been named as defendants as in the instant case, the

opinion of the Supreme Court to my mind indicates that the Circuit Court would have had jurisdiction. Indeed, the answers of the Supreme Court were certified with liberty to the Circuit Court of Appeals to authorize an amendment of the bill alleging the necessary diversity of citizenship of the individual members. With the appropriate amendment, I have no doubt that in that case, as well as in the Port of Seattle case, the Court would have had jurisdiction to finally adjudicate the right in question, and grant complete equitable or legal relief in accordance with the class of the respective cases.

"I think the principle laid down in Ex Parte State of New York, No. 1,256 U. S. 490, and Smith vs. Reeves, 178 U. S. 436, is applicable to the case at bar, and that the action here was merely one against the State Highway Commission and its individual members as such. A brief interesting note will be found on the subject in 44 L. R. A. (N. S.) at page 196. I quote from the note: 'In some of the cases the state agency or board is itself a corporation with general power to sue and be sued. In other cases the result in the main seems to depend upon the nature of the action or relief demanded. Thus, in the Lord case, infra, it was a question of obtaining money out of the state treasury; * * *.' 'In Lord & P. Chemical Co. vs. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032, it was held that an action would not lie against the board of agriculture, its commissioner, and the state treasurer to recover taxes paid under protest to it, and turned over it seems to the state treasurer, as the board was a department of the government, and that the action was an action against the state.'

"There is another serious question going to the jurisdiction of a Federal Court. The legislature of the State of Wyoming in amending the original act provided; 'The commission shall have the power to sue in the name of 'The

State Highway Commission of Wyoming' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it.'

"The case of Smith vs. Reeves, supra, was one brought by an individual against Reeves as State Treasurer of California. Section 3669 of the Political Code of California provided in case of actions against the State Treasurer for the recovery of taxes illegally collected that 'at the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento.' It was contended in that case that by the section referred to the State had consented that its Treasurer might be sued in respect to the matters specified. Mr. Justice Harlan, in delivering the opinion of the Court, said:

> 'It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the county of Sacramento,' indicate that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the Treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value; for, as the jurisdiction and authority of a

Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it and to proceed to final decree, nor could it, merely in obedience to the laws of the State, transfer it to a state court upon the demand of the State Treasurer. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States.

'In Beers vs. Arkansas, above cited, it was further said: 'As this permission (to be sued) is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted and may withdraw its consent whenever it may suppose that justice to the public requires it. Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suits might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is that it was passed after the suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was

found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant.' "

"Now the question occurs, if a State can resist its suability or the suability of its Treasurer or other officer as such, why may it not likewise restrict the suability of its Commission from whom it has withheld corporate capacity?

"I think the judgment of the District Court should have been affirmed.

"Filed December 21, 1927."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Utah Construction Company, a corporation, plaintiff in error, vs. The State Highway Commission of Wyoming, defendant in er-

ror. No. 7793", to the end that the said case may be reviewed and determined by this Court as provided in Section 240 of the Judicial Code as amended by the Act of Congress of February 13th, 1925, providing for certiorari to Circuit Courts of Appeals; and that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court. And your petitioner will ever pray, etc.

STATE HIGHWAY COMMISSION OF WYOMING

By .....

Attorney General of Wyoming.

J. A. Greenwood,
John Dillon
Marion A. Kline
Of Counsel for Petitioner.

We hereby certify that we have examined the foregoing petition and that in our opinion it is well founded and is one in which the prayer of your petitioner should be granted by this Court.

WILLIAM O. WILSON
J. A. GREENWOOD
JOHN DILLON
MARION A. KLINE
Attorneys for Petitioner.

In the Supreme Court of the United States

October Term 1927

No.....

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

Brief in Support of Petition.

The opinion of the District Court in this case will be found at Page 110 of the Record and is reported in 16 Federal Reporter, Second Series, at Page 322. The opinion of the Circuit Court of Appeals, not as yet officially reported, will be found at Page 121 of the Record. (22 Fed Rep (2nd) 638)

Question Involved.

The sole and only question involved in this case is the question of the jurisdiction of the federal courts to hear and determine the controversy. Defendant contends that

this action is in fact an action against the sovereign state of Wyoming, and that therefore the federal courts are without jurisdiction, no federal question being involved. In order to determine this question, it is necessary to call the Court's attention to certain provisions of the Constitution and statutes of Wyoming, relative to highway construction, and then analyze the contract which is the basis of the suit in the light of those constitutional and statutory provisions.

Constitutional Provisions and Statutes of the State of Wyoming involved in this action.

Prior to 1916, the State of Wyoming could not engage in any work of internal improvement unless authorized so to do by a two-thirds vote of the people. In that year a new section was added to Article XVI of the Constitution, which reads as follows:

> "Sec. 9. State highway construction. The provision of Section 6 of Article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

In 1919, in order to render effective this amendment to the Constitution, the Legislature of Wyoming passed a State Highway Act. This is now Sections 3025-3037 of the Wyoming Compiled Statutes of 1920; and said law has been in force ever since its passage, except for a certain amendment to Section 3025, passed by the Legislature of 1927.

This Act has been analyzed in the accompanying petition, and the material portions, including the 1927 amendment thereof, are set forth in full in the Appendix to this brief, and are hereby referred to for further particularity.

Even the most cursory reading of these constitutional and statutory provisions conclusively demonstrates that the State Highway Commission is but an arm or agency of the State of Wyoming, created by the state when the people of the state determined to go into the business of constructing state highways; its contracts are the contracts of the state; the moneys paid out by it for the building of those state highways is the money of the State of Wyoming, and not the money or property of any board or individual.

District Judge Kennedy makes the following clear analysis of these constitutional and statutory provisions in his decision:

> "In the light of this authority in analyzing the issue here, we find that the highway construction over which the controversy arises, was initiated by a constitutional amendment which authorized the State of Wyoming to go into the road building business. The state thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. It provided for raising money by bonding itself and taxing its inhabitants for the purpose, and providing that such money, as well as that received from other sources, should be accumulated in the hands of its State Treasurer; that its chief legal adviser should be the legal adviser of its agency in the premises; that such agency should maintain its office in the State Capitol; that the state might enter into agreements with the United States for the building of roads, under an Act of Congress, which type of road was here under construction; and directed the

manner in which the funds so raised by it should be disbursed, as well as the other incidents which are incorporated heretofore in an analysis of the Wyoming statute." (Record at Page 115)

In connection with the provisions of Section 3034, supra, we also deem it best at this point to call the Court's attention to parts of Sections 118, 131 and 132 of the Wyoming Compiled Statutes of 1920, which have a material bearing upon this case. These are set forth in full in the Appendix. They make it the duty of the State Auditor to audit all claims to be paid out of moneys in the State Treasury and to draw all warrants upon the State Treasurer for money. Section 132 makes it a felony for the State Treasurer to pay out any state funds except on warrants drawn by the State Auditor.

The last section is especially significant. The money in the State Highway Fund is state funds, and that money can only be drawn out of the state treasury on warrants issued by the State Auditor. The defendant Highway Commission has absolutely nothing whatever to do with the payment for work done under contracts for state highway construction. Before any warrants are drawn upon the State Highway Fund by the State Auditor, the vouchers must be approved by the State Highway Superintendent, (Section 3034), but the latter officer is entirely independent of the State Highway Commission. That fact must not be lost sight of. Section 3025 of the Wyoming Statutes provides for the creation of a state highway department to consist of "a state highway commission and a state highway superintendent."

Statement of the Facts.

In 1922, while the above statutory provisions were in force, the Highway Department of the State of Wyoming advertised for bids for the construction of a state highway through the Wind River Canyon. As shown in the accompanying Petition for Writ of Certiorari, this advertisement and the specifications for the work contained many provisions showing that the State of Wyoming was the party in interest which was letting the contract. (Record—Pages 14, 25, 63, 65, 68, etc.)

The Utah Construction Company was the lowest bidder for Sections B, C and D of the road, and thereupon gave a bond conditioned for the faithful performance of the terms and conditions of its contract. This bond was payable to the State of Wyoming, not to the State Highway Department or the State Highway Commission. Thereafter, on June 1st, 1922, a contract was entered into between the Utah Construction Company and the State of Wyoming for the building of these sections of the road. The State Highway Commission acted as the agency of the state in the making of this contract, which is set forth on Pages 68 ffg. of the Record.

That contract provides for the construction of a state highway, the expense of which under the law is to be borne by the State of Wyoming. The State of Wyoming is specifically designated therein as one of the contracting parties, viz, the party of the first part. Most significant of all is the fact that in said contract the construction company agrees to build the road according to certain plans and specifications made a part of the contract, and the State of Wyoming, (not the State Highway Commission or any other agency,) agrees to pay for such work according to the prices

stipulated in the proposals. Here in the contract itself is a definite and fixed statement defining the parties who are obligated under the contract: one, the Utah Construction Company, for the performance of the work, and the other, the State of Wyoming, for the payment for such work.

Later on a supplemental contract was entered into which provided for certain changes in the work to be done, and for an increase in the quantities of tunnel work and unclassified excavation. (Record—Page 72.) This supplemental contract states that it supplements the contract of June 1st, 1922, but it in no manner changes or attempts to change the parties to the original contract or their liability thereunder.

Thereafter, the Utah Construction Company went ahead with the construction work, and in due time completed the work of building said highway. Monthly estimates were made by the State Engineer during the progress of the work, vouchers were submitted by the Construction Company, approved by the State Highway Superintendent, as required by law, and paid by the State of Wyoming out of the State Highway Fund on warrants drawn by the State Auditor. However, after the final completion of the work, a disagreement arose between the parties as to the amount still due to the contractor for work done thereunder.

History of the Case.

The parties being unable to agree as to the amount due the contractor or to settle their differences, on May 13, 1925, the Utah Construction Company filed suit in the United States District Court for the District of Wyoming against the State Highway Commission, to recover the sum of $544,827.74, which said sum was alleged to be due as damages for breach of the contract and for work done and per-

formed under the contract. It is significant that while the State Highway Commission of Wyoming is named as the defendant in that action, yet there is not a single allegation in the petition to show that said commission ever agreed to do a single thing, or that it had ever agreed to pay the construction company anything, or that it had in any way injured, wronged or defrauded the plaintiff. In fact, no liability on the part of said defendant is alleged or shown in the petition, nor does said petition state any cause of action against said Commission. If the petition shows any liability to the plaintiff on the part of any person, or states any cause of action whatever against any one, it shows such liability on the part of the State Engineer, an independent state official, or on the part of the State of Wyoming whom the petition alleges to be the party who had promised to pay for the work done under the contract.

All of these matters are fully set forth in the accompanying petition, and will not be here repeated.

Specifications of Error.

The petitioner relies upon the following specification of error:

The Circuit Court of Appeals erred in holding that the action is not an action against the State of Wyoming, and therefore the federal courts have jurisdiction thereof.

This specification of error will be discussed under the following sub-headings:

1. The findings and decision of the Circuit Court of Appeals that the action is not an action against the State of Wyoming, is erroneous, being in conflict with the previous decisions of this court and with the overwhelming weight of authority;

2. The findings and decision of the Circuit Court of Appeals that an action may be maintained against a state agency on a contract entered into by it on behalf of the State and in which it has no personal interest, is erroneous and in conflict with the decisions of this court;

3. The decision of the Circuit Court of Appeals, holding that this action is not an action against the State of Wyoming, is erroneous in that it decides a question of Wyoming law in conflict with previous decisions of the Wyoming courts;

4. The decision of the Court of Appeals holding that the provisions of Chapter 61 of the Session Laws of Wyoming, 1927, are not controlling in the case at bar, is erroneous and in conflict with the previous decisions of this Court;

5. The decision of the Circuit Court of Appeals is self-contradictory;

6. The decision of the Circuit Court of Appeals would compel the United States District Court for the District of Wyoming and the parties litigant to this action to do a vain and useless act.

I.

The findings and decision of the Circuit Court of Appeals that the action is not an action against the State of Wyoming, is erroneous, being in conflict with the previous decisions of this court and the overwhelming weight of authority.

It is the contention of your petitioner that this action is in effect an action against the State of Wyoming, and therefore within the inhibition of the Eleventh Amendment to the federal constitution.

As has been shown this is an action upon a written contract, the first cause of action being for damages for an al-

leged breach of that contract, and the second cause of action being for the recovery of a certain amount alleged to be due under the terms of that contract on estimates allowed by the State Engineer. It is elementary law that an action on a contract will lie only against those who are parties to that contract, and who are obligated to perform its terms and conditions. In this case, the State of Wyoming is not only named as the contracting party but it is the only party upon whom is imposed the obligation to pay for the work done under that contract. (Record, Page 69, Paragraph II.)

To be sure, the State of Wyoming is not named as a party defendant in this action, and therefore, the lack of jurisdiction of the federal courts does not formally appear on the face of the pleadings. But this Court has long been committed to the doctrine announced in the case of Hopkins v. Clemson Agricultural College, 221 U. S. 363, where it is said:

> "With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent, it can not be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation, or to pay out its money in his possession on the state's obligations, or to execute a contract, or to do any affirmative act which affects the state's political or property rights." (Authorities).

In support of this proposition, see the following authorities:

Hagood v. Southern, 117 U. S. 52;
Louisiana v. Jumel, 107 U. S. 711;
Ex Parte Ayers, 123 U. S. 443;
Louisiana v. Steel, 134 U. S. 230;
Fitts v. McGhee, 172 U. S. 516;
Murray v. Wilson Distilling Co., 213 U. S. 151;
Pennoyer v. McConnaughy, 140 U. S. 1;
Smith v. Reeves, 178 U. S. 436;
Lankford v. Platte Iron Works Co., 235 U. S. 461;
In Re State of New York, 256, U. S. 490;
Stanley v. Schwalby 162 U. S. 255;
Belknap v. Schild, 161 U. S. 10;
Cunningham v. Railroad Co., 109 U. S. 446;
Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309;
State v. Field, (N. Mex.) 201 Pac. 1059;
United States v. McCallum, 281 Fed. 834;
McDowell v. Fuller, (Mich.) 135 N. W. 265; 150 N. W. 353.

In the case of Smith v. Reeves, supra, the action was against the Treasurer of the State of California to recover from him the amount of certain taxes which had theretofore been paid to him by the plaintiff. This Court held that the federal courts were without jurisdiction, because the action was against the State of California. Quoting from the opinion:

> "Is this suit to be regarded as one against the State of California, The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief

> sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

Petitioner believes the last sentence of the above quotation is a complete answer to that part of the majority opinion of the Circuit Court of Appeals, where it is said:

> "The commission is the sole defendant, it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. In that event, it will be entirely optional with the state as to what, if anything, it will do in the premises. It will not be legally bound."

The Circuit Court of Appeals thus concedes that if a judgment be recovered in this action, the State of Wyoming is the party which ultimately must pay the judgment, if it be paid at all, and petitioner submits that a judgment against an authorized agency of the state would morally bind the state and "would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

In the case of Ex Parte Ayers, supra, Ayers, who was Attorney General of the State of Virginia, had been imprisoned for contempt by the United States Circuit Court for disregarding an order of that court enjoining and restraining him from bringing certain suits as commanded by an enactment of the Legislature of Virginia. He brought habeas corpus proceedings in this court, and this court made an order discharging him from custody. Mr. Justice Matthews, in the course of a very exhaustive opinion in

which the former decisions of the court were reviewed, used the following language, which when applied to the facts in the case at bar, would seem to be decisive against the jurisdiction of the federal court:

> "The inference is, that where it is manifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction."

and the Court further added that the Eleventh Amendment to the Constitution must be held to cover

> "not only those suits brought against a state by name, but also those against its officers, agents, and representatives, where the state, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates."

In the decisions of this Court above referred to the actions were brought against natural persons as agents of the State, but the rule of law must be the same where the agency representing the state is a corporation, or a board, or a commission, as in the case at bar. This is clearly shown in the following cases:

State ex rel Gordon v. State Board of Control, (W. Va.) 102 S. E. 688;

Carpenter v. Railway Co., (N. C.) 114 S. E. 693;

Mullen v. Regents of Education (S. D.) 173 N. W. 645.

The Circuit Court of Appeals held that the federal courts have jurisdiction of this case because of diverse citizenship, and cites as its authority for such holding the decision of this Court in the case of Thomas v. Board of Trustees, 195 U. S. 207, 218. (Record—Page 131.) That case, however, is clearly distinguished in the dissenting opinion of Judge Scott, (Record, Page 132). It can also be further distinguished from the case at bar in this: The Board of Trustees of Ohio State University was not only empowered "to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gift, devise or bequest moneys, lands and other properties for its benefit", but in addition thereto, in that case, the facts were that certain lands were in the possession of this Board, and the Board as a Board claimed ownership thereof. The plaintiff brought an action for the partition of those lands and sought to have the title adjudicated as preliminary to the partition. The trial court found that the land belonged to the Board of Trustees of the Ohio State University. In that case, also, the question of the suit being a suit against the State of Ohio was not raised in any manner, nor was the Eleventh Amendment in any way referred to. The action had reference solely to lands the alleged title to which was in the Board of Trustees. The Board alone was the party in interest. Petitioner respectfully submits that the Thomas case is not an authority in point in this case, because of the difference in the facts of the two cases, but that this case is controlled rather by the decision of this Court in Murray v. Distilling Co., 213 U. S. 151.

In the latter case, two cases were consolidated for hearing, the other being Murray v. The Fleischmann Company. The bill of complaint in The Fleischmann Company case is set

forth in full in the opinion of the Circuit Court of Appeals, 164 Fed. 1. It there appears that the case was entitled,

> "The Fleischmann Company, Complainant, v. W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Constituting the State Dispensary Commission of the State of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Individually, Defendants."

The bill of complaint rested the jurisdiction of the federal courts upon an alleged diversity of citizenship of the parties, and it contained the allegations that each of the individual defendants was a citizen and resident of the State of South Carolina, and that the complainant was a resident and citizen of the State of Ohio, thus complying with the rule as announced by this Court in the Thomas case so that the jurisdiction of the Circuit Court "sufficiently appeared as far as the pleadings were concerned."

Such being the facts as shown by the pleadings, what did the courts do? The trial court found for the plaintiffs, and the Circuit Court of Appeals affirmed its decree, but when the case reached this Court, it looked through form to substance and saw that the State was the real party defendant, instead of its agent, the State Dispensary Commission, the nominal defendant, and held that the federal courts were without jurisdiction, because the suits were in effect suits against the sovereign state of South Carolina and thus were within the inhibition of the Eleventh Amendment to the Federal Constitution.

The following quotation from the opinion of the Court in the Murray case is very significant and persuasive when applied to the facts as they appear in the case at bar:

> "We could not, therefore, sustain the exercise of jurisdiction by the circuit court without in effect de-

> ciding that the state can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied."

What is the case at bar but an attempt to compel the State of Wyoming to perform an alleged contract and to pay the Utah Construction Company for work and labor alleged to have been done and performed under that contract? It is admitted that the defendant Commission has no funds, no power of taxation and no means of paying any judgment.

Petitioner respectfully submits that the Murray case is practically on all fours with the case at bar, and that the decision in that case should control the decision in the instant case; also, that the decision of the Circuit Court of Appeals is in direct conflict with the foregoing decisions of this Honorable Court, is in contravention of the Eleventh Amendment to the Federal Constitution, and therefore should be reversed and set aside.

II.

The findings and decision of the Circuit Court of Appeals that an action may be maintained against a state agency on a contract entered into by it on behalf of the state and in which it has no personal interest, is erroneous and in conflict with the decisions of this court.

The Circuit Court of Appeals holds in effect that although the contract here in question was entered into by a state agency for the construction of a state highway, to be paid for by the State of Wyoming, yet, after all, since the agency was in the nature of a Board or Commission, and not a natural person, such Commission could be held liable on the contract. It is conceded in its opinion that the members of

the commission would not be personally liable, had they been made parties, because their acts were official and not of a personal character. (Record, Page 131).

With all due deference to the Court of Appeals, it is respectfully submitted that the Court either misunderstood or misapplied the authorities cited in its opinion in support of the above statement. The members of the Commission did not act as individuals, either officially or otherwise, in regard to the contract sued on. It was the Highway Commission that acted in the execution of this contract and its acts were official and not of a personal character. As said by Chief Justice Marshall in the case of Hodgson v. Dexter, 1 Cranch, 345:

> "It is too clear to be controverted that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They enure to the benefit of, and are obligatory on, the Government; not the officer." See also Belknap v. Schild, 161 U. S. 10.

Now, it is too clear to admit of argument, that under this rule of law, if the Governor or State Treasurer of the State of Wyoming had been authorized by law to execute contracts for the construction of State Highways, the costs of which were to be paid by the State of Wyoming, and they had executed such contract in behalf of the State, the Governor or such other officer could not be held personally liable on such contract, nor could any suit be maintained against such officer on said contract. But if this be true of a natural person as agent, it must also be true of every other agent, whether that agent be a corporation, a Board or a Commission authorized to act for and in behalf of the State.

The case of Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corporation, 295 Fed.

415, 417, cited in the opinion of the Circuit Court of Appeals is practically on all fours with the case at bar and is an authority against rather than in favor of its decision. In that case, action was brought by the plaintiff against the defendant corporation to recover $188,000.00, alleged to be due on a contract between plaintiff and defendant. The contract recited that it was made between the Astoria Marine Iron Works, party of the first part, and the United States Shipping Board Emergency Fleet Corporation, representing the United States of America (hereinafter called the owner) party of the second part. The hulls referred to in the contract and which were to be built by the plaintiff did not belong to the defendant corporation, but were the property of the United States, and the money to be used in payment on the contract was the money of the United States regularly appropriated by act of Congress, etc.

Under this state of facts, the Court overruled the demurrer to the answer and held that:

> "The defendant is not in my judgment liable personally on the contract so made any more than the President would have been if he had made it himself. It is an established rule of law that where a public officer or agent acts in the line of his duty and by legal authority, he is not responsible on any contract he makes in that capacity, and when his contract or engagement is concerned with a subject fairly within the scope of his authority, it shall be considered to have been made by him officially and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable, although such contract may be under his hand and seal."

It will be noticed that in the above case it was disclosed on the face of the contract, that the Emergency Fleet Corporation, although it was the person executing the contract, entered into that contract in behalf of the United States of America. In the case at bar, also, the contract on its face discloses that the State Highway Commission of Wyoming, the person executing the contract, was acting for and in behalf of the State of Wyoming, the real party to the contract. If the reasoning of Judge Bean in the above case is correct, and the decisions of this court cited by him uphold him in his position, then, in the present case, the defendant Commission cannot be held personally liable on this contract.

The fallacy of the reasoning of the Circuit Court of Appeals may be shown as follows: Suppose that instead of designating the State Highway Commission and giving it power to enter into contracts for the construction of State Highways, the legislature had seen fit to designate an individual, as for instance, the Secretary of State, to exercise the powers conferred by the State Highway Act upon the State Highway Commission. According to the opinion of the Court of Appeals, an action would lie against the Secretary of State on such contract and yet according to the same opinion he would not be personally liable thereon.

Petitioner respectfully submits that in the present case it acted in the line of its duty, under authority of law; that its contract was made on account of the State of Wyoming and enured to the benefit of the State; that petitioner has no personal interest in said contract and is not liable thereon.

III.

The decision of the Circuit Court of Appeals holding that this action is not an action against the State of Wyoming is erroneous in that it decides a question of Wyoming law in conflict with previous decisions of the Wyoming courts.

The Wyoming Supreme Court and the inferior courts of the State have uniformly held that suits of this character are suits against the State itself. On this proposition see

Hjorth Royalty Co. vs. Trustees of University, 30 Wyo. 309;

Franzen vs. Southern Surety Co., 35 Wyo. 15.

In the Hjorth Royalty Company case suit was brought against the Board of Trustees of the University of Wyoming to quiet title to a certain piece of land, which had been granted to the State of Wyoming by the federal government for the benefit of the University. The Supreme Court held that the suit was a suit against the State of Wyoming and laid down the following rule of law:

> "A suit against a department of the state government or a board or corporation created by the state for governmental purposes, is a suit against the state."

In the case of Franzen v. Southern Surety Co., supra, the facts were that on June 1st, 1922, the State Highway Commission of Wyoming had entered into a contract with the firm of Fitzgerald Bros. for the building of a portion of a state highway located in Albany County. In compliance with the provisions of Section 329 of the Wyoming statutes, the contractors gave a bond with the Southern Surety Company as surety, conditioned for the faithful performance of the contract and "to pay all just claims for all work or labor performed and material furnished in the execution of the contract." Thereafter, Franzen who had furnished materials to the contractors for which he had not been paid, brought an action on the bond.

It will be noted that in the above case, as in the case at bar, there was a contract for the building of a state highway, and no doubt it was executed on the same printed form that

was used in the present case, as the contract here sued on was executed on June 3, 1922, just two days later than the contract in the Franzen case.

In its decision the Wyoming Supreme Court makes the following statement which shows clearly the position of the Wyoming courts:

> "Section 329 supra, deals with bonds in connection with contracts made by public officials under the control of the state. The contract in this case was let by one of the departments of the state itself. We are unable to see why the state may not let its own contracts upon any conditions, of benefit to the public, which it deems fit to impose, or why the Legislature should not have the power to require the agents of the state to let such contracts only upon such conditions. No authority to the contrary has been called to our attention."

Thus it will be seen that the Wyoming Supreme Court unequivocally holds that the State Highway Commission is "one of the departments of the state itself." If one of the departments of the state, then its contracts are the contracts of the State of Wyoming, and the next statement in the Court's opinion would naturally follow, "that the State may let its own contracts upon any conditions it sees fit to impose."

Here is the construction of a Wyoming statute by the Wyoming Supreme Court, and in accordance with well established rules of procedure the federal courts should follow such construction, and should hold that your petitioner is a department and agency of the state and that the contract sued on in this case is the contract of the State itself. See

Barnum v. Okolona, 148 U. S. 393;
Bacon v. Insurance Co., 131 U. S. 258;
Townsend v. Todd, 91 U. S. 452.

As the matter now stands, we have on the one hand the Wyoming Supreme Court announcing the doctrine that under the Wyoming statutes creating the State Highway Commission, the Commission is a department of the State of Wyoming itself, and that contracts entered into by said Commission for the construction of state highways are the contracts of the State of Wyoming, and that a suit against a department of the state created by the State for governmental purposes is a suit against the State itself; and, on the other hand, the Circuit Court of Appeals of the Eighth Circuit speaking through Judge Lewis, holding that the State Highway Commission is a legal entity separate and apart from the state, and that the contracts entered into by it in behalf of the State of Wyoming are its own contracts and not the contracts of the State, and that a suit against such Commission is not a suit against the State. Petitioner respectfully submits that the construction adopted by the Wyoming Supreme Court is the only construction in consonance with all the facts in this case. Further, these holdings of the Wyoming court in the construction of the Wyoming statutes have always been followed by the federal courts in Wyoming. See Fidelity and Deposit Company of Maryland v. Trustees of the University of Wyoming, et al., 16 Fed. (2nd Ser.) 150.

IV.

The decision of the Circuit Court of Appeals holding that the provisions of Chapter 61 of the Session Laws of Wyoming, 1927, are not controlling in the case at bar, is erroneous and in conflict with the previous decisions of this Court.

As heretofore stated, the Wyoming State Legislature in 1927 passed an Act amending Section 3025 of the Wyoming Compiled Statutes of 1920, so as to provide that the State

Highway Commission may be sued in the Wyoming courts "and in no other jurisdiction upon any contract executed by it."

It was admitted by respondent in the District court and also in its brief filed in the Circuit Court of Appeals that the State Highway Commission is merely a state agency existing for governmental purposes, and that as such agency, it could not be sued except as provided in the statute creating it. But if the State Highway Commission is so far an arm or agency of the State of Wyoming that the legislature of that state can prescribe the courts where and the terms and conditions under which it may be sued, then it is so far an arm or agency of the state that the state may withdraw at any time the consent given, or hedge it about with new terms and conditions. There can be no other conclusion from the authorities. Hence the Legislature of 1927 had the right to prescribe in what courts the Commission might be sued.

As has been shown, the State of Wyoming created the State Highway Commission as an arm or agency of the state itself. It is not a body corporate, nor has it any status in any court except such as has been given it by the statute creating it. It is neither a natural nor an artificial person. It is not even a legal entity, except in so far as it is made such by statute. Certainly when the Wyoming State Legislature of 1927 provided that said Commission could be sued only in the state courts and in the courts of no other jurisdiction, it violated no contractual rights of the plaintiff.

It is elementary that a law providing that the State may be sued in certain cases or in certain courts is not a contract, and that such a law may be modified or repealed even while an action which has been brought under such law is pending.

See

Beers v. Arkansas, 20 How. 527;
In re Ayers, 123 U. S. 443;
Hans v. Louisiana, 134 U. S. 1;
Ex Parte State, 52 Ala. 235;
Railroad Co. v. Tennessee, 101 U. S. 337;
Railroad Co. v. Alabama, 101 U. S. 832;
Baltzer v. North Carolina, 161 U. S. 240;
Vance v. Ranking, (Ill.) 62 N. E. 807;
South Carolina v. Gaillard, 101 U. S. 433;
Holcomb v. Boynton, (Ill.) 37 N. W. 1032;
In re McCardle, 7 Wall. 514;
McDowell v. Fuller, (Mich.) 135 N. W. 265; 150 N. W. 353;
Oliver American Trust Co. v. Government of the U. S. of Mexico, 5 Fed. (2nd Ser.) 659;
In re Hoople, 179 N. Y. 308, 72 N. E. 229;
Ball v. Halsell, 161 U. S. 72.

On this proposition, the pronouncement of this court in the cases of Beers v. Arkansas, and Railroad Co. v. Tennessee are especially persuasive, though in those cases the states themselves were named in the record as defendants.

The case of McDowell v. Fuller, supra, is practically on all fours with the case at bar. In that case an action was begun by McDowell as assignee of the firm of Edward Wallenstein Co. against Otis Fuller, as warden of the Michigan State Reformatory, to recover damages for an alleged breach of a contract entered into between its assignor and Fuller for the manufacture of shirts and the employment of prison labor in such manufacture. The case was tried to a jury and there was a judgment for the plaintiff in the sum of $22,000.00. The defendant took a writ of error to the Supreme Court.

In the meantime, after the rendition of the judgment and before the case was heard in the Supreme Court, the legislature amended the act under which the suit had been brought. The law as it stood at the time the suit was brought and trial had, contained a provision that all the fiscal transactions and dealings "on account of each prison shall be conducted in the name of the warden thereof, who shall be capable in law of suing and being sued in all matters concerning said prison, by his name and office."

The amendment provided that the warden might sue in his own name upon prison contracts, but omitted the provision that he might be sued.

The case was heard twice in the Supreme Court, once on a motion to dismiss the appeal and action, 135 N. W. 265, and afterward on its merits, 150 N. W. 353, when the Court reversed the judgment of the trial court and refused to grant any new trial, thus ending the litigation. In its opinion reported in 135 N. W. 265, the Court used the following language, every word of which is applicable to the peculiar facts in the case at bar:

> "In so far as appears from what is presented in this motion, defendant Fuller is sued and declared against as "warden of the Michigan Reformatory", not as a private individual but as a state official, touching a contract made by him in his capacity of such Warden and while acting as agent of the state, under statutory authority, in charge of one of its penal institutions. * * * Defendant is sued "by his name of office" under authority of the same act which empowered him to make the contract for the state. He is not claimed to have acted, and is not sued, as a private individual. His participation in terminating the contract in question was in an official capacity, as warden, by authority of the board of control

of said institution, a legally constituted agency of the state, under whose direction he conducted the affairs of the institution.

"While the contract purports to be the contract of the warden, and he is the nominal party defendant it was in truth a contract with and for the state, negotiated by and through him as its agent, thus making this action intrinsically against the state of Michigan. • • •

"The state is sued in the name of its officer and agent by his "name of office" under express permission and authority granted by said Section 2091, without which the suit could not have been so instituted. Act. 219, S. L. 1911, amending said section took away both the independent right of the warden to sue others and all right of others to sue him, and to that extent repealed in terms said section.

"The state is at liberty to determine for itself whether it may be sued and in what manner. Laws governing such consent may be repealed at any time, and, as a general rule, upon repeal of a statute authorizing suit against a state not only can not suits thereafter be brought, but the court in which suit against a state is pending can proceed no further. This principle has been more than once recognized and announced in decisions of this court."

Petitioner respectfully submits that under the above authorities, when the legislature of 1927 passed the above amendment, limiting suits against the State Highway Commission to the courts of the State of Wyoming, that amendment, ipso facto, deprived the federal courts of any further jurisdiction in the case at bar.

V.

The decision of the Circuit Court of Appeals is self-contradictory.

This matter has been called to the attention of the Court in the petition for certiorari, where the majority and minority opinions are set forth in full. With all due deference to the Circuit Court of Appeals, the petitioner respectfully submits that said opinion is inconsistent with itself.

The majority opinion first lays down the rule that "those only can sue or be sued upon an indenture who are named or described in it as parties", and it then says, "Primarily the commission could not be sued at law unless it be a party to the contract". With this statement of the law petitioner agrees, but it does not agree with the application of that statement as made by the Circuit Court of Appeals to the facts in the case at bar. As we have seen, the first paragraph of the contract is in these words:

> "This agreement made and entered into this 1st day of June, 1922, between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the contractor". (Record—Page 68).

From this paragraph it distinctly appears that the parties to the contract are the State of Wyoming and the Utah Construction Company, and that the State Highway Commission is the state agency which represents the State in the transaction. Nothing could be clearer than this, if this paragraph has any force or meaning at all.

Then paragraph II of the contract also is very specific as to the parties. It reads as follows:

> "In consideration of the covenants and agreements to be kept and performed by the Contractor, and for

> the faithful performance of this contract and the completion of the work embraced therein according to the plans, specifications and conditions herein contained and referred to, the State of Wyoming shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract and also for all loss or damage arising out of the nature of the contract, the action of the elements or from any unforseen contingencies or difficulties encountered in the prosecution of the work, the prices stipulated in the proposal." (Record—Page 69.)

Then take the testimonium clause, which reads as follows:

> "In witness whereof, the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part has caused these presents to be executed and has hereto affixed his hand and seal the 3rd day of June, A. D. 1922". (Record—Page 71).

Can there be any question from these paragraphs but that the State of Wyoming is the person named therein as a party to the contract, and that under the statement of the law by the Court of Appeals, it is the only party who may be sued thereon? Can the force of such statements in the contract be entirely abrogated by a statement in the supplemental agreement that the contract was entered into "between the State Highway Commission of Wyoming and the Utah Construction Company"? A supplemental agreement by its very nature does not in any way destroy or abrogate

the original agreement but merely supplements the same,—adds something thereto. The two must be read together so as to get the entire agreement, and if there is anything that appears contradictory therein, that construction must be given which will harmonize them and give effect to every phrase and clause. But the Circuit Court of Appeals in the majority opinion ignored the above provisions of the original contract and bases its decision upon one clause of the supplemental contract, a clause that can readily be harmonized with all the other recitals of both contracts.

The original contract recites that the State of Wyoming was acting through the State Highway Commission, the contract was signed by the State Highway Commission and its seal attached, and such being the facts there is no question but that the contract was entered into between the "State Highway Commission of Wyoming and the Utah Construction Company", as recited in the first paragraph of the supplemental agreement, but it was entered into by the State Highway Commission as agent acting for and in behalf of the State of Wyoming.

Then the majority opinion says: (Record—Page 130)

> "The statute made it (i. e. State Highway Commission) a legal entity for that purpose, imposed on it the duty of initiating the improvement, to supervise its construction and to make settlements with the contractor."

Yet in the very same opinion where the statute itself is quoted, it says that Section 3026 provides that the "State Highway Superintendent shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended", (Record—Page 122); that Section 3027 provides that the State Highway Superintendent "shall have complete charge" of

all contracts for state highway construction; (Record—Page 123), and Section 3034 provides for all payments to be made by warrants upon the State Treasurer, and no warrant shall be drawn on the State Highway Fund except on voucher approved by the State Highway Superintendent. (Record—Page 124). But the State Highway Superintendent and the State Highway Commission are separate and distinct divisions of the State Highway Department. (See Sec. 3025). (Record—Page 122).

Again the Court of Appeals in the majority opinion says: "We are not impressed with the soundness of the contention that the suit is in reality one against the State", and yet in the very same paragraph, it concedes that should a judgment be recovered against the defendant commission, if that judgment is paid at all, it will have to be paid by the State of Wyoming. Petitioner respectfully submits that if the State of Wyoming is the only party to whom the judgment creditor can look for payment, then it is the real party in interest.

Again, the Court of Appeals in the majority opinion says:

> "It hardly need be said that the members of the Commission would not be personally liable had they been made parties; because their acts were official and not of a personal character". (Record—Page 131.)

But the individual members of the Commission were not acting in an official or any other capacity in the making of this contract. They were acting simply as members of the State Highway Commission, and that commission, and not the individual members composing it, acted in an official and not in a personal capacity, in entering into the contract in controversy here. Petitioner submits that the case of

Belknap v. Schild, 161 U. S. 10, Hodgson v. Dexter, 1 Cranch 345, and other cases cited in the majority opinion, instead of supporting the conclusions stated in said opinion, are in direct conflict therewith.

How much clearer and more self-consistent are the dissenting opinion of Judge Scott and the opinion of the trial court, as reported on Pages 110 and 132 of the Record.

VI.

The decision of the Circuit Court of Appeals would compel the United States District Court for the District of Wyoming to do a vain and useless act.

The Circuit Court of Appeals in its opinion admits that the defendant commission has no property, no power of taxation, no means of discharging a judgment should one be recovered against it. This being true and there being no party who could be made to respond to a judgment, or any party legally liable thereon, what is the use of taking up several weeks of the time of the United States District Court, as well as the time of attorneys and witnesses to accomplish what Judge Scott has aptly declared " a mere gesture". Two of the oldest and best established legal maxims are lex nil facit frustra, and lex neminen cogit ad vana seu inutilia. Surely nothing could be more useless than a paper judgment against a nominal defendant without money or property, or any means of ever satisfying such judgment.

Conclusion.

The decision of the Circuit Court of Appeals, in the case at bar, if unchallenged and unreversed, becomes the law of the case, and thereby compels the State of Wyoming, in an action brought against it by a citizen and resident of the State of Utah, to submit itself to the jurisdiction of the fed-

eral courts, in contravention of the provisions of the federal constitution and statutes and in violation of the policy of said state as expressed in its own statutes and in the decisions of its Supreme Court. We submit that the petition for writ of certiorari should be granted and the cause reviewed by this Honorable Court.

Respectfully submitted,

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MARION A. KLINE,
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Appendix

The following are those portions of the Wyoming Compiled Statutes of 1920 which have a material bearing upon the questions under discussion:

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years. * * * The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the 'State Highway Commission of Wyoming,' and may be sued by such name in any Court upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all actions and appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words 'State Highway Commission of Wyoming, Official Seal.".

"Section 3026. The Commission shall appoint a State Highway Superintendent, with a salary to be fixed by the Commission, payable in equal monthly installments. He shall be experienced and skilled in highway and bridge construction and maintenance; shall be allowed his actual and necessary traveling and other expenses incurred in the discharge of his official duties, and shall give his entire time to the duties of his office. Before entering upon the duties

of his office he shall take the constitutional oath of office and give bond to the State of Wyoming in such amount and with such surety as may be approved by the Commission, conditioned upon the faithful discharge of his duties and his accounting for all property, material and records in his control. Under the supervision of the Commissioner he shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended, except on those highways constructed, improved or maintained in co-operation with the Secretary of Agriculture of the United States under Section eight of the Act of Congress or other Federal Act or Acts specifically authorizing the use of Federal Funds to build roads within or partially within the national forests, and with the approval of the Commission shall purchase all materials, supplies and equipment, including road building machinery, materials, supplies and equipment, and shall employ such engineers, superintendents and employees with salaries to be approved by the Commission, as may be necessary for the proper performance of the duties of the Commission and the construction work undertaken by it."

"Section 3027. All road and bridge construction work any part of the cost of which is paid from the state highway fund shall be performed in accordance with the plans and specifications prepared by the state highway superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the state highway superintendent shall have complete charge thereof, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or partially within the national forests."

"Section 3028. It shall be the duty of the state highway commission from time to time to designate public highways to be known as state highways, which may coincide in whole or in part with county roads theretofore legally established, and whenever such state highway shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties, in so much of the road and right of way as shall be so designated shall pass to and vest in the state of Wyoming."

"Section 3029. Excepting as such work may be performed in cooperation with the secretary of agriculture of the United States as hereinafter provided, the construction and maintenance of all state highways, including all bridges, and culverts thereon, shall be performed at the expense of the state and by and under the supervision of the commission and the state highway superintendent."

"Section 3031. The legislature of the state of Wyoming, hereby assents to the provisions of the act of Congress approved July 11th, 1916, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' together with all acts and legislation amendatory thereto or supplementary thereto or which shall grant or authorize aid for the construction, improvement, maintenance or repair of public roads or highways. The state highway commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of roads under the provisions of the said act or acts of congress to submit such scheme or program of construction or maintenance as may be required by the secretary of agriculture and to do all other things necessary fully to carry out the cooperation contem-

plated and provided for by the said act or acts, for the construction or improvement of highways under the said act, the good faith of the state is hereby pledged to make available funds sufficient to equal the sums apportioned by the state by or under the United States Government during each of the years for which federal funds are appropriated by section 3 of said act, and to maintain the roads so constructed with the aid of funds appropriated and to make adequate provisions for carrying out such maintenance. * * * If the road to be improved under such cooperative agreement is a state highway, the state's share of the expense shall be borne entirely by the state."

"Section 3034. There is hereby created a fund to be known as the state highway fund, to the credit of which the state treasurer, who is hereby designated as the state official to receive all amounts paid by the United States under the said act of Congress approved July 11, 1916, shall place all moneys heretofore received for said fund, all money hereafter received from the United States, under cooperative agreements as hereinbefore authorized, all money derived from taxes levied for such purpose or appropriated for said fund, all moneys received from the sale of state bonds for highway construction or improvement, all money received from the counties under cooperative agreements as hereinbefore authorized, and all other moneys received from donations or bequests which may be accepted by the commission on behalf of the state of Wyoming, or from any other source designated by law for that purpose. All moneys in said fund shall be available for the purposes of this chapter without further appropriation and no warrant shall be drawn thereon excepting on voucher approved by the state highway superintendent."

"Section 3035. Appropriation. There is hereby appropriated to the state highway fund in the state treasury not otherwise appropriated, the sum of three hundred thousand dollars which shall be made available upon the passage of this chapter, and the additional sum of three hundred thousand dollars which shall be available on March first, 1920."

"Section 3020. For the purpose of providing funds for the construction and improvement of public roads and highways in Wyoming, the state treasurer, with the approval of the governor is hereby authorized from time to time within the limits of the amount authorized by law to issue and dispose of bonds of the State of Wyoming to be designated as highway bonds."

"Section 3021. Such bonds shall bear date and may be issued in such amounts and bearing such rates of interest * * * as shall be determined by the governor and state treasurer. * * * They shall be signed by the governor and attested by the secretary of state under the seal of the state and countersigned by the state treasurer."

In 1927, Section 3025 of the Wyoming Compiled Statutes, 1920, supra, was amended and re-enacted so as to read as follows: (Ch. 61, Sec. 1.)

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years; provided, that upon the passage of this chapter, the governor shall appoint two commissioners for the term of two years, two commissioners for the term of four years,

and one commissioner for the term of six years. One commissioner shall be appointed from each of the following described districts: District No. 1, composed of the counties of Laramie, Albany, Platte and Goshen; District No. 2, composed of the counties of Carbon, Sweetwater, Uinta, Lincoln, Sublette and Teton; District No. 3, composed of the counties of Niobrara, Converse, Natrona and Fremont; District No. 4, composed of the counties of Hot Springs, Washakie, Big Horn and Park; District No. 5, composed of the counties of Sheridan, Johnson, Campbell, Crook and Weston. If any commissioner shall cease to be a resident of the district from which he is appointed, his office shall be vacant; all vacancies from any cause shall be filled by appointment by the governor for the unexpired term. Each of said commissioners shall qualify by taking the constitutional oath of office and each shall receive a salary of six hundred dollars per year and his actual and necessary traveling expenses while away from his home in the performance of the duties of his office, to be paid from the state highway fund hereinafter provided. The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the "State Highway Commission of Wyoming", and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all action—and shall also appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words "State Highway Commission of Wyoming, Official Seal," and all copies of all records and other instruments in the office of the commission, certified under the hand of its secretary with said seal affixed shall be re-

ceived in any court as prima facie evidence of the original record or instrument."

The following sections of the Wyoming Compiled Statutes of 1920, defining the duties of the State Auditor and the State Treasurer, have also an important bearing on the questions before the court, when taken in connection with the statutes relative to the State Highway Fund:

"Section 118. The State Auditor shall:

First—Audit and settle all claims against the state payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers and persons.

Second—Draw all warrants upon the treasurer for money.

Third—Express in the body of any warrant which he may draw upon the treasurer, for money, the particular fund appropriated by law out of which the same is to be paid.

Fourth—Audit, settle and adjust the accounts of the collectors of the revenue, and other holders of public money, who are required by law to pay the same into the treasury.

Fifth—Keep an account between the state and the state treasury.

Sixth—Keep an account of all debts and credits between the state and the United States, and between the state and every other state, sovereignty, community, officer or person, with whom the state may have dealings, and of any separate fund in the state authorized by law.

Seventh—Direct prosecution in the name of the state for all official delinquencies in relation to the assessment, collection and payment of the revenue, against all persons who may, by any means, become possessed of public money or property and fail to pay over or deliver the same, and against all debtors of the state.

Eighth—Give information in writing to either house of the legislature, whenever required, upon any subject relating to the fiscal affairs of the state, or touching any duty of his office.

Ninth—Perform all such other duties as may be required of him by law."

"Section 131. The State Treasurer shall:

First—Receive and keep all moneys of the state, not expressly required by law to be received and kept by some other person.

Second—Pay all warrants duly and legally issued by the auditor so long as there are in his hands funds sufficient to pay such warrants; Provided, That his payment for any purpose shall in no case exceed the amount appropriated for such purpose.

Third—Keep a just, true and comprehensive account of all money received and disbursed.

Fourth—Keep a just and true account of each head of appropriation made by law, and the disbursements made under the same.

Fifth—Render his account to the auditor for settlement quarterly, or oftener if required.

Sixth—Give information in writing to either house of the legislature whenever required, upon any subject connected with the treasury, or touching any duties of his office.

Seventh—Perform all such other duties as may be required of him by law."

"Section 132. The treasurer shall in no case disburse or pay out the state funds except on warrants drawn by the auditor. Any violation of the provision of this section shall be deemed a felony and upon conviction thereof, the perpetrator shall be punished by a fine of not more than three thousand dollars and by imprisonment for not more than five years in the penitentiary."

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October Term, 1927

No. 33,304

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THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

WILLIAM O. WILSON,
JAMES A. GREENWOOD,
JOHN DILLON,
MARION A. KLINE,
Counsel for Petitioner.

WYOMING LABOR JOURNAL, CHEYENNE

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In the Supreme Court of the United States

October Term, 1927

No. 33,304

THE STATE HIGHWAY COMMISSION OF WYOMING, CONSISTING OF HYRAM LINGLE, T. D. O'NEIL, S. W. CONWELL, J. M. SNYDER and ROY SENEY,

Petitioner,

vs.

UTAH CONSTRUCTION COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN BEHALF OF PETITIONER

Introduction

This case is before this Honorable Court on Writ of Certiorari to the Circuit Court of Appeals of the Eighth Circuit. The opinion of the District Court will be found at Page 115 of the Record and is reported in 16 Federal Reporter, (Second Series) at Page 322. The opinion of the Circuit Court of Appeals will be found at Page 126 of the Record and is reported in 23 Federal Reporter, (Second Series) at Page 638.

Grounds On Which the Jurisdiction of This Court Is Invoked

The sole and only question involved in this case is whether under the United States Constitution and the Federal Judiciary Act, the United States District Court for the District of Wyoming has jurisdiction to hear and decide the issues involved in this action. Petitioner contends that this is in reality an action against the sovereign State of Wyoming and therefore the federal courts are without jurisdiction, while respondent contends that the action is against the State Highway Commission of Wyoming, which it claims is a separate and distinct entity created by the State and that, therefore, the federal courts have jurisdiction. These matters appear more fully in the Statement of the Case, which immediately follows.

Statement of the Case

In order that the Court may have a clear understanding of the questions involved, petitioner will set forth, (1) Those provisions of the Constitution and Statutes of the State of Wyoming which are applicable to the case at bar, (2) a statement of the facts as shown by the pleadings, and (3) a review of the litigation in this case.

Constitutional Provisions and Statutes of the State of Wyoming Involved in This Action.

Prior to 1916, the State of Wyoming could not engage in any work of internal improvement unless authorized so to do by a two-thirds vote of the people. In that year a new section was added to Article XVI of the Constitution, which reads as follows:

> "Sec. 9. State highway construction. The provision of Section 6 of Article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

In the year 1919, in order to render effective this amendment to the Constitution, the Wyoming Legislature passed an Act known as the State Highway Act. (Session Laws of Wyoming, 1919, Chapter 132.) Said law has been in force ever since its passage and now appears as Sections 3025-3037 of the Wyoming Compiled Statutes, 1920, with the exception that Section 3025 was amended by the Legislature of 1927. (Chapter 61, Sec. 1, of the Session Laws of Wyoming, 1927.) The material portions of said State Highway Act, including the 1927 amendment, are set forth in full in the appendix to this brief.

Said State Highway Act contains the following provisions:

(1) For the creation of a "State Highway Department to consist of a State Highway Commission and a State Highway Superintendent";

(2) That the "State Highway Commission shall consist of five State Highway Commissioners, who shall be appointed by the Governor with the advice and consent of the Senate";

(3) That the "Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name in any court upon any contract executed by it";

(4) That the Attorney General shall be the legal adviser of said Commission;

(5) That the Commission shall maintain offices in the State Capitol Building in charge of the State Highway Superintendent;

(6) *That there shall be created a "State Highway Fund", in the possession and under the control of the State Treasurer, who shall place to its credit all moneys paid to the State of Wyoming by the United States to assist in the building of public highways, all moneys received from the sale of State bonds for highway construction or improvement, all moneys derived from State taxes levied for highway purposes,* etc.;

(7) *That the moneys in said State Highway Fund shall not be paid out except by warrants issued by the State Auditor on vouchers approved by the State Highway Superintendent;*

(8) *That the title to the lands over which any State Highway may be built,* including the road-bed and right-of-way, *shall vest in the State of Wyoming;* and,

(9) That *the construction and maintenance of all State Highways,* including bridges and culverts thereon, *shall be performed at the expense of the State* and by and under the supervision of the Commission and the State Highway Superintendent.

The Act also appropriated a certain sum out of the general funds in the State Treasury for carrying on the work of construction of State highways under the provisions of said Act, and additional sums have been appropriated by each succeeding Legislature.

In 1927 the Legislature amended Section 3025 of the Statutes so that it now provides that the State Highway Commission may be sued in the Courts of the State of Wyoming and in no other jurisdiction upon its contracts.

In connection with the provisions of Section 3034, supra, we also deem it best at this point to call the Court's attention to parts of Sections 118, 131 and 132 of the Wyoming Compiled Statutes of 1920, which have a material bearing upon this case. These are set forth in full in the Appendix. They make it the duty of the State Auditor to audit all claims to be paid out of moneys in the State Treasury and to draw all warrants upon the State Treasurer for money. Section 132 makes it a felony for the State Treasurer to pay out any state funds except on warrants drawn by the State Auditor.

The Legislature of 1919 also made provision for the issuance of bonds of the State of Wyoming to aid in the building of State Highways. (See Session Laws of Wyoming, 1919, Chapter 82.) These are now Sections 3020-3024 of the Wyoming Compiled Statutes, 1920. The material portions thereof are as follows:

> Section 3020. "For the purpose of providing funds for the construction and improvement of public roads and highways in Wyoming, the state treas-

urer, with the approval of the governor is hereby authorized from time to time within the limits of the amount authorized by law to issue and dispose of bonds of the State of Wyoming to be designated as highway bonds."

Section 3021. "Such bonds shall bear date and may be issued in such amounts and bearing such rates of interest * * * as shall be determined by the governor and state treasurer." * * * They "shall be signed by the governor and attested by the secretary of state under the seal of the state and countersigned by the state treasurer." * * * "The bonds shall be deposited until sold with the state treasurer, *and when sold the proceeds of such bonds shall be paid into the state treasury and be kept in a separate fund which shall be known as the State Highway Fund.*"

While these Statutes were in full force and effect the State Highway Department, in the spring of 1922, determined to construct a State Highway through the Wind River Canyon in Fremont and Hot Springs Counties, Wyoming. Said Highway was to be built in co-operation with the United States Government, and is designated in the advertisement for bids and in the contract sued on in this action as the "Wind River Canyon Road State Highway",—"Federal Aid Project No. 118". Bids were called for, and the respondent. Utah Construction Company, being the lowest bidder for the construction of Sections B, C and D of said State Highway, its bid was accepted. (R. 66, 68, 70.)

Thereafter, on June 1st, 1922, a contract was entered into with the Utah Construction Company for the building of said highway. A copy of this contract is annexed to plaintiff's petition, and appears on Pages 71 to 75 of the

Record. We will call attention to some of its most significant provisions.

The first paragraph reads as follows:

> "This Agreement, made and entered into this 1st day of June, 1922, between *the State of Wyoming,* acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the State of Utah, hereinafter called the contractor." (R. 71)

It was further provided that the road to be built under said contract was a portion of the Wind River Canyon Road State Highway; that the work was to be done to the satisfaction of the State Highway Engineer; that when the work of building said road had been completed the *State of Wyoming should pay,* and the contractor should receive, as full compensation for everything furnished and done under the contract the unit prices stipulated in the proposal; and that in the event of a breach of the contract by the contractor, it should pay to *the State of Wyoming* a certain amount as liquidated damages. The contract also contains many other provisions showing that the State of Wyoming is a party thereto. The testimonium clause is as follows:

> "In Witness Whereof, *The State of Wyoming,* acting through *its* State Highway Commission, *party of the first part,* has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed, on the day and year first above written; and the said party of the second part, has caused these presents to be executed and has hereunto affixed his hand and seal the 3rd day of June, A. D. 1922." (R. 74)

It was further provided in said contract that the advertisement for bids, proposals, plans, specifications, etc. should be considered as a part of said contract, and these latter also contain many provisions showing that the State of Wyoming is the real party in interest and the party that was building said road. (R. 14, 26, 67, 69, 71, etc.)

After the above contract had been duly executed by the parties thereto, the respondent, Utah Construction Company, began the work of building said State Highway, and in due time completed the same. In December, 1922, a supplemental agreement was entered into. (R. 75) This supplemental agreement is very short, and provides for certain changes in grades and alignments, and for the doing of a large amount of additional excavation, tunnel work, etc. at the unit prices mentioned in the original contract. It also provides for an extension of time within which to complete the work. *But said supplemental agreement does not in any way change, alter or modify any of the provisions of the original contract referred to in the preceding paragraphs.*

During the progress of the work the Utah Construction Company, in accordance with the provisions of the Statute hereinbefore referred to, filed each month its sworn vouchers for work done, which were approved by the State Highway Superintendent. Warrants were drawn by the State Auditor for the amount of these vouchers, and these warrants were paid by the State Treasurer out of moneys in the State Highway Fund.

After said highway had been completed, the parties being unable to agree on the amount due under the contract, on May 13, 1925, the Utah Construction Company filed in the United States District Court for the District of Wyoming its petition naming the State Highway Commission of Wyoming as defendant. In its first cause of action it

sought to recover the sum of $456,053.93, which it alleged to be due as damages for an alleged breach of said contract; and in its second cause of action it sought to recover the sum of $88,773.81, which it alleged to be remaining due and unpaid on estimates given by the State Highway Engineer for work done and performed under said contract. (R. 3-13)

In said petition it is alleged that the matter and amount in controversy exceeds the sum and value of $3,000.00; that the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Utah and "was and is a citizen and resident of the State of Utah", and then further alleges as the basis of its claim for the jurisdiction of the federal court,

> "That the said Hyram Lingle, G. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney are respectively the duly appointed, qualified and acting Highway Commissioners of the State of Wyoming, and that collectively the said persons above named constitute the State Highway Commission of Wyoming with power to sue and be sued under the provisions of the statute of Wyoming in such case made and provided. That the said persons constituting the said State Highway Commission of Wyoming, and the said Commission is each a resident and citizen of the State of Wyoming." (R. 3)

While the State Highway Commission is named as the defendant in said petition, there is not a single allegation in the petition to show that said commission had ever agreed to do a single thing, or that it had ever agreed to pay the plaintiff anything, or that it had in any way done anything to injure, wrong or defraud the plaintiff. In fact, the petition plainly states that the State of Wyoming is the party

who agreed to pay plaintiff for the building of said highway. (R. 5)

The defendant first by demurrer (R. 78) and then by answer (R. 89) and again by demurrer to the reply (R. 100) challenged the jurisdiction of the United States District Court, on the ground that the action was in reality an action against the sovereign State of Wyoming by a resident and citizen of the State of Utah and that therefore, under the federal Constitution and Statutes, the federal court was without jurisdiction. This contention was sustained by the District Court and the case dismissed.

From that decision the Utah Construction Company took a Writ of Error to the United States Circuit Court of Appeals of the Eighth Circuit, which in an opinion by a divided court, reversed the decision of the District Court and held that the action was against the State Highway Commission of Wyoming and not against the State of Wyoming itself, and that the federal courts had jurisdiction. (R. 126) Thereupon the defendant filed in this Court its petition for a Writ of Certiorari, which in due time was granted by the Court.

Specification of Error

Petitioner relies upon the following specification of error:

The Honorable Circuit Court of Appeals for the Eighth Circuit erred in holding that this action is not an action against the sovereign State of Wyoming, but is an action against a separate and distinct entity, to-wit, State Highway Commission of Wyoming, and that therefore the federal courts have jurisdiction thereof.

Argument

Briefly summarized, petitioner relies upon the following propositions to sustain its contention that the decision of the Circuit Court of Appeals is erroneous and that the District Court of the United States for the District of Wyoming is without jurisdiction to hear and determine the issues involved in this action.

1. The State Highway Commission of Wyoming is merely an arm or agency of the state and in entering into contracts for the building of state highways, it represents the state and is an *alter ego* of the state.

2. This is not only the holding of the courts of last resort but the Supreme Court of Wyoming has expressly so held and its holding should be followed by this Court.

3. The State Highway Commission of Wyoming being an arm or agency of the State of Wyoming, it can not be held personally liable upon any contract entered into by it in behalf of the state, when it has no personal interest in the contract, and this is especially true where the contract itself shows on its face that the state is the real party in interest.

4. Even if the State of Wyoming is not named as a party defendant in this action, yet if it clearly appears that the state is the real party in interest, then the suit is in reality a suit against the state itself and therefore within the inhibition of the Eleventh Amendment to the federal constitution.

5. The State of Wyoming can not either by consent or waiver confer jurisdiction upon the federal courts, where

such jurisdiction has not been expressly given by the federal constitution or the acts of Congress passed in pursuance thereof.

6. The jurisdiction of the federal court in the case at bar is predicated upon diversity of citizenship, but if the State of Wyoming is the real party in interest, then such jurisdiction fails because a state is not a citizen within the meaning of the federal constitution.

7. Even if it be conceded that the State of Wyoming gave its consent to be sued in the federal court by an action against its State Highway Commission, yet that consent was taken away by the Legislature of 1927, and when such consent was withdrawn jurisdiction at once failed.

8. Conclusion.

I.

The State Highway Commission of Wyoming is merely an arm or agency of the State of Wyoming, and in entering into contracts for the building of State Highways it represents the State of Wyoming and is an *alter ego* of the State.

We believe that even the most cursory reading of the constitutional and statutory provisions hereinbefore referred to and which are set forth in full in the appendix to this brief, conclusively demonstrates that the State Highway Commission is but an arm or agency of the State of Wyoming created by the Legislature of that State when the people of the State determined to go into the business of constructing state highways; its contracts are the contracts of the State; the money paid out for the building of said highways is the money of the State of Wyoming, raised by general taxation or the sale of bonds of the State, and

is in the possession and under the control of the State Treasurer. Said funds are not the property of any board or individual.

In his decision, sustaining the demurrer to the petition, District Judge Kennedy makes the following clear analysis of these constitutional and statutory provisions:

> "In the light of this authority in analyzing the issue here, we find that the highway construction over which the controversy arises, was initiated by a constitutional amendment which authorized the State of Wyoming to go into the road building business. The state thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. It provided for raising money by bonding itself and taxing its inhabitants for the purpose, and providing that such money, as well as that received from other sources, should be accumulated in the hands of its State Treasurer; that its chief legal adviser should be the legal adviser of its agency in the premises; that such agency should maintain its office in the State Capitol; that the state might enter into agreements with the United States for the building of roads, under an Act of Congress, which type of road was here under construction; and directed the manner in which the funds so raised by it should be disbursed, as well as the other incidents which are incorporated heretofore in an analysis of the Wyoming statute." (R. 121)

It is difficult to conceive how any function could be more clearly regarded as the act of the State itself than the building of state highways in Wyoming under the foregoing constitutional and statutory provisions. Then take the statutory provisions in regard to payment for work on state highways. The money in the State Highway Fund is State

funds, and that money can only be drawn out of the State Treasury on warrants issued by the State Auditor. (Wyoming Compiled Statutes, 1920, Section 118.) The State Highway Commission has absolutely nothing whatever to do with any payment for work done under contracts for the construction of state highways. Before any warrant is drawn upon the State Highway Fund by the State Auditor for the payment of such construction work, the voucher must be approved by the State Highway Superintendent. (Section 3034, Wyoming Compiled Statutes, 1920.) But the State Highway Superintendent is entirely independent of the State Highway Commission. Section 3025 of the statutes provides for the creation of a State Highway Department to consist of "a State Highway Commission and the State Highway Superintendent."

This precise question was before the chancery court of the State of New Jersey in the case of Curtis & Hill Gravel & Sand Company vs. State Highway Commission et al., 91 N. J. Eq. 421, 111 Atl. 16. In that case, as in the case at bar, the question before the Court was, "Is a suit against the State Highway Commission a suit against the State itself?" The Court decided it was and dismissed the bill with costs. In its opinion in that case the Court uses the following language, every word of which is equally applicable to the law and facts in the case at bar:

> "That the state highway commission is an *alter ego* of the state, and not a mere subordinate, is so clear as to need little discussion. The statute (P. L. 1917, p. 35, Sec. 1.) created a state highway department, to be governed by a board to be known as the state highway commission. The members of the commission are the Governor himself, ex officio, and eight members appointed by the governor by and with the advice and consent of the Senate. The contracts made

by the commission are clearly contracts of the state; they may be made either in the name of the state or of the commission. The funds expended for its work are the funds of the state, and expended through the usual state channels. The work which it is to do is the construction and maintenance of a state highway system, reaching throughout the entire state and for the benefit of all the citizens, not merely in or for any particular locality or the citizens thereof."

We believe that what was said by the New Jersey Chancery Court could also be said with equal force in regard to the case at bar. The highway built under the contract in this case is a state highway, a federal aid project, paid for out of funds in the state treasury, and it was built for the benefit of all the citizens of the State of Wyoming. Surely the State Highway Commission under such circumstances in making the contract and supervising the construction of the highway was an *alter ego* of the State of Wyoming itself.

II.

The Supreme Court of the State of Wyoming has also held in effect that the State Highway Commission is merely an arm or agency of the State and that its contracts are the contracts of the State itself.

We believe that these decisions of the Wyoming Supreme Court on a question of local law are controlling, and that for this reason the decision of the Circuit Court of Appeals is erroneous and should be set aside. On this proposition see the following cases:

Hjorth Royalty Co. vs. Trustees of University, 30 Wyo. 309;

Franzen vs. Southern Surety Co., 35 Wyo. 15.

In the Hjorth Royalty Company case suit was brought against the Board of Trustees of the University of Wyoming to quiet title to a certain piece of land, which had been granted to the State of Wyoming by the federal government for the benefit of the University. The Supreme Court held that the suit was a suit against the State of Wyoming and laid down the following rule of law:

> "A suit against a department of the state government or a board or corporation created by the state for governmental purposes, is a suit against the state."

In the case of Franzen v. Southern Surety Co., supra, the facts were that on June 1st, 1922, the State Highway Commission of Wyoming had entered into a contract with the firm of Fitzgerald Bros. for the building of a portion of a state highway located in Albany County. In compliance with the provisions of Section 329 of the Wyoming statutes, the contractors gave a bond with the Southern Surety Company as surety, conditioned for the faithful performance of the contract and "to pay all just claims for all work or labor performed and material furnished in the execution of the contract." Thereafter, Franzen who had furnished materials to the contractors for which he had not been paid, brought an action on the bond.

It will be noted that in the above case, as in the case at bar, there was a contract for the building of a state highway, and no doubt it was executed on the same printed form that was used in the present case, as the contract here sued on was executed on June 3, 1922, just two days later than the contract in the Franzen case.

In its decision the Wyoming Supreme Court makes the following statement which shows clearly the position of the Wyoming courts:

"Section 329, supra, deals with bonds in connection with contracts made by public officials under the control of the state. The contract in this case was let by one of the departments of the state itself. We are unable to see why the state may not let its own contracts upon any conditions, of benefit to the public, which it deems fit to impose, or why the Legislature should not have the power to require the agents of the state to let such contracts only upon such conditions. No authority to the contrary has been called to our attention."

Thus it will be seen that the Wyoming Supreme Court says that the State Highway Commission is "one of the departments of the state itself." If one of the departments of the state, then its contracts are the contracts of the State of Wyoming, and the next statement in the Court's opinion would naturally follow, "that the State may let its own contracts upon any conditions it sees fit to impose."

Here is the construction of a Wyoming statute by the Wyoming Supreme Court, and in accordance with well established rules of procedure the federal courts should follow such construction, and should hold that your petitioner is a department and agency of the state and that the contract sued on in this case is the contract of the State itself. See

Barnum v. Okolona, 148 U. S. 393;
Bacon v. Insurance Co., 131 U. S. 258;
Townsend v. Todd, 91 U. S. 452.

Counsel for respondent have attempted to distinguish the above cases and argue that the statement quoted from the Franzen case is mere dictum, but we submit that any analysis of the case will show that it was a point necessary to be decided under the facts in that particular case, and that therefore, it is something more than dictum.

Counsel also contend that even if the Hjorth case and the Franzen case are to be taken as laying down the rule for which they are here cited, still they are not binding on the federal courts, for the question here is one of jurisdiction. We are unable to follow counsel in this argument. Certainly, if the Wyoming courts hold under the provisions of the Wyoming statutes that the contracts made and entered into by the State Highway Commission are the contracts of the State itself, they are deciding a question of local law and not a question of jursidiction, as counsel would have us believe. And when a suit is brought in the federal courts upon such a contract, the federal court in deciding the question of whether this action is an action against the State of Wyoming and therefore beyond its jurisdiction, must follow these decisions of the Wyoming Supreme Court and must hold that the contract here sued on is a contract of the State itself, and that, therefore, a suit against the State Highway Commission on such contract is a suit against the State of Wyoming itself.

III.

The State Highway Commission being an arm or agency of the State of Wyoming, it can not be held liable upon any contract entered into by it in behalf of the State when it has no personal interest in such contract.

In its opinion the Circuit Court of Appeals held in effect that although the contract here in question was entered into by a state agency for the construction of a state highway, to be paid for by the State of Wyoming out of funds in the State Treasury, yet, since the agency was in the nature of a board or commission, created by statute, and not a natural person, such commission was personally liable on the

contract. It is conceded in its opinion that the members of the commission would not be personally liable, had they been made parties, because their acts were official and not of a personal character. (R. 136.)

With all due deference to the Court of Appeals, it is respectfully submitted that the Court either misunderstood or misapplied the authorities cited in its opinion in support of the above statement. The members of the Commission did not act as individuals, either officially or otherwise, in regard to the contract sued on. It was the Highway Commission that acted in the execution of this contract and its acts were official and not of a personal character. As said by Chief Justice Marshall in the case of Hodgson v. Dexter, 1 Cranch 345:

> "It is too clear to be controverted that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They enure to the benefit of, and are obligatory on, the Government; not the officer."

Now, it is too clear to admit of argument, that under this rule of law, if the Governor or State Treasurer of the State of Wyoming had been authorized by law to execute contracts for the construction of state highways, the costs of which were to be paid by the State of Wyoming, and they had executed such contract in behalf of the State, the Governor or such other officer could not be held personally liable on such contract, nor could any suit be maintained against such officer on said contract. But if this be true of a natural person as agent, it must also be true of every other agent, whether that agent be a corporation, a Board or a Commission authorized to act for and in behalf of the State.

The case of Astoria Marine Iron Works v. United States Shipping Board Emergency Fleet Corporation, 295 Fed. 415, 417, cited in the opinion of the Circuit Court of Appeals is practically on all fours with the case at bar and is an authority against rather than in favor of its decision. In that case, action was brought by the plaintiff against the defendant corporation to recover $188,000.00, alleged to be due on a contract between plaintiff and defendant. The contract recited that it was made between the Astoria Marine Iron Works, party of the first part, and the United States Shipping Board Emergency Fleet Corporation, representing the United States of America (hereinafter called the owner) party of the second part. The hulls referred to in the contract and which were to be built by the plaintiff did not belong to the defendant corporation, but were the property of the United States, and the money to be used in payment on the contract was the money of the United States regularly appropriated by act of Congress, etc.

Under this state of facts, the Court overruled the demurrer to the answer and held that:

> "The defendant is not in my judgment liable personally on the contract so made any more than the President would have been if he had made it himself. It is an established rule of law that where a public officer or agent acts in the line of his duty and by legal authority, he is not responsible on any contract he makes in that capacity, and when his contract or engagement is concerned with a subject fairly within the scope of his authority, it shall be considered to have been made by him officially and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable, although such contract may be under his hand and seal."

It will be noticed that in the above case it was disclosed on the face of the contract, that the Emergency Fleet Corporation, although it was the person executing the contract, entered into that contract in behalf of the United States of America. In the case at bar, also, the contract on its face discloses that the State Highway Commission of Wyoming, the person executing the contract, was acting for and in behalf of the State of Wyoming, the real party to the contract. If the reasoning of Judge Bean in the above case is correct, and the decisions of this court cited by him uphold him in his position, then, in the present case, the defendant Commission cannot be held personally liable on this contract.

The fallacy of the reasoning of the Circuit Court of Appeals may be shown as follows: Suppose that instead of designating the State Highway Commission and giving it power to enter into contracts for the construction of State Highways, the legislature had seen fit to designate an individual, as for instance, the Secretary of State, to exercise the powers conferred by the State Highway Act upon the State Highway Commission. According to the opinion of the Court of Appeals, an action would lie against the Secretary of State on such contract and yet according to the same opinion he would not be personally liable thereon.

This Court has also announced the same doctrine in the case of Belknap v. Schild, 161 U. S. 10.

We respectfully submit that in entering into the contract for the construction of the Wind River Canyon State Highway and in supervising the construction of said highway, the State Highway Commission acted in the line of its duty under authority conferred upon it by law; that the contract discloses on its face that it was made in behalf of the State of Wyoming; and that the Commission had no personal interest in said contract, which was a public contract enuring to the benefit of the State and all its citizens.

IV.

Even if the State of Wyoming is not named as a party defendant to this action, yet if it clearly appears that the State is the real party in interest, then the suit is a suit against the State itself and within the inhibition of the Eleventh Amendment to the Federal Constitution.

Before taking up and discussing the authorities upon which we rely to sustain the above proposition, we wish again to call the Court's attention to the contract which is the basis of this action. That contract specifically designates the State of Wyoming as the contracting party and the State Highway Commission as its agent. Both in the opening paragraph and in the testimonium clause, we find these words used in describing the party of the first part to that contract, *"The State of Wyoming, acting through its State Highway Commission."* (R. 71, 74)

Not only is the State of Wyoming named as the contracting party, but it is also the person who is obligated by said contract to pay for the work that was to be done under said contract. Paragraph II of said contract provides that on performance of the contract by the Utah Construction Company, the "State of Wyoming shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract * * * the prices stipulated in the proposal." (R. 72)

This is an action upon a contract and it is elementary law that an action on a contract will lie only against those who are named as parties to that contract, and who are obligated to perform its terms and conditions.

However, in spite of the fact that the State of Wyoming is named in the contract as a party thereto, the Utah Construction Company in its suit on this contract did not make

the State a party defendant, but brought its action against the State Highway Commission, the agent which entered into this contract in behalf of the State.

But even if the State of Wyoming is not named as a party defendant to this action, the courts will look through form to substance and ascertain whether the action, though nominally against a state agency, is not in reality an action against the State of Wyoming itself. This Court has uniformly held that where an action has been brought against an officer or agency of the State to compel him or it to pay out money on the State's obligations, or to carry out contractual obligations, or to do any affirmative act which affects the State's political or property rights, the action is one in effect against the State, and that the State should be regarded as the real party defendant though not named as such in the pleadings.

In the matter of the State of New York, 256 U. S. 490, this Court, speaking through Mr. Justice Pitney, says in regard to this class of cases:

> "The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts."

The Court further said in the above case, that this class of cases extended to such also *as would require the state to make pecuniary satisfaction for any liability.*

And in the case of Hopkins v. Clemson Agricultural College, 221 U. S. 636, this Court speaking through Mr. Justice Lamar, said:

> "With the exception named in the Constitution, every state has absolute immunity from suit. Without

its consent, it can not be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the 11th Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer, which seeks to compel him to exercise the state's power of taxation, or to pay out its money in his possession on the state's obligations, or to execute a contract, or to do any affirmative act which affects the state's political or property rights." (Authorities).

And this is the rule as announced not only by this Court but also by the Supreme Court of Wyoming and all appellate courts. Among the many cases announcing this rule are the following:

Hagood v. Southern, 117 U. S. 52;
Louisiana v. Jumel, 107 U. S. 711;
Ex Parte Ayers, 123 U. S. 443;
Louisiana v. Steel, 134 U. S. 230;
Fitts v. McGhee, 172 U. S. 516;
Murray v. Wilson Distilling Co., 213 U. S. 151;
Pennoyer v. McConnaughy, 140 U. S. 1;
Smith v. Reeves, 178 U. S. 436;
Lankford v. Platte Iron Works Co., 235 U. S. 461;
In Re State of New York, 256 U. S. 490;
Stanley v. Schwalby, 162 U. S. 255;
Belknap v. Schild, 161 U. S. 10;
Cunningham v. Railroad Co., 109 U. S. 446;
Hjorth Royalty Co. v. Trustees of University, 30 Wyo. 309;

State ex rel. Evans v. Field, 27 N. M. 384;
United States v. McCallum, 281 Fed. 834;
McDowell v. Fuller, 169 Mich. 332; 183 Mich. 639.

In the case of Hagood v. Southern, supra, an action was brought against Hagood as Comptroller General of the State of South Carolina and the State Treasurer of South Carolina to compel them to do and perform certain acts looking toward the payment of certain certificates of indebtedness of the state, which were owned and held by the plaintiffs. This Court in the course of a very elaborate discussion lays down the principles that should govern in deciding whether an action brought against an officer or agency of a state is in reality a suit against the state itself. As many of the Court's remarks have peculiar application to the facts in the case at bar, we will quote quite extensively from the opinion:

> "These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and except with that consent it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed; the one required to perform the decree and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the

> decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States."

To the same effect is the opinion in the case of Louisiana v. Jumel, supra, where a similar action had been begun in the Federal courts against the State Auditor, State Treasurer and the Board of Liquidation of the State of Louisiana.

In the case of Smith v. Reeves, supra, the action was against the Treasurer of the State of California to recover from him the amount of certain taxes theretofore paid.

The State Treasurer represented by the Attorney General of the state, demurred to the complaint upon various grounds, and also moved to dismiss the case upon the ground that the Circuit Court had no jurisdiction of the defendant or of the action. The motion to dismiss was denied but the demurrer was sustained, and the plaintiff refusing to plead further, the action was dismissed.

It will be noticed that the Circuit Court entertained jurisdiction of the case and dismissed the bill. The Circuit Court of Appeals held that the Circuit Court erred in holding jurisdiction but it affirmed the order of dismissal upon the ground that the Circuit Court had no jurisdiction to take cognizance of such a case as was there presented. This Court approved the action of the Circuit Court of Appeals and affirmed its judgment, holding that the Circuit Court had no jurisdiction. In its opinion, this Court says:

"Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the state a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

In the case of Ex Parte Ayers, supra, Ayers, who was Attorney General of the State of Virginia, had been imprisoned for contempt by the United States Circuit Court for disregarding an order of that court enjoining and restraining him from bringing certain suits as commanded by an enactment of the Legislature of Virginia. He brought habeas corpus proceedings in this court, and this court made an order discharging him from custody. Mr. Justice Matthews, in the course of a very exhaustive opinion in which the former decisions of the court were reviewed, used the following language, which when applied to the facts in the case at bar, would seem to be decisive against the jurisdiction of the federal court:

"The inference is, that where it is manifest upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the state, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the state, is one of jurisdiction."

and the Court further added that the Eleventh Amendment to the Constitution must be held to cover

> "not only those suits brought against a state by name, but also those against its officers, agents, and representatives, where the state, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates."

The Ayers case was one of the earlier cases before this Court in which this doctrine was announced, and the Court discussed at length the reasons for the rule. It says:

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover not only suits brought against a state by name, but those also against its officers, agents and representatives, where the State, though

> not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

Now, in the case at bar, if any judgment should be obtained by the Utah Construction Company, while nominally such judgment would be against the State Highway Commission, yet such judgment would operate only against the State of Wyoming, for if such judgment was ever paid, it would be paid by the State. In fact, this is conceded by the Circuit Court of Appeals when it says:

> "The Commission is the sole defendant; it has no property, no power of taxation, no means of discharging a judgment, should one be recovered against it. In that event, it will be entirely optional with *the state* as to what, if anything, it will do in the premises." (R. 136)

Petitioner respectfully submits that if the State of Wyoming is the party which must ultimately pay the judgment in this action, if a judgment be obtained, then it is the real party defendant, within the interpretation of the rule as announced in the above cases.

We would be content to submit this phase of the question upon the above decisions of this Court were it not for the fact that respondent in the lower courts and in its brief filed herein in resistance to the application for writ of certiorari, has attempted to distinguish those cases from the case at bar. It says that we overlook the "difference between a state officer acting for the state and a juristic entity created by the state for the purpose of expressly performing, in its own name, a certain state and county function."

As this precise question has not been considered in any of the foregoing cases from this Court, we wish briefly to call the attention of the Court to the following state decisions which are directly in point upon this question:

State ex rel. Gordon v. State Board of Control, 85 W. Va. 739;

Carpenter v. Railway Co., 184 N. C. 400;

Mullen v. Regents of Education, 42 S. D. 171.

In the case of State ex rel. Gordon v. State Board of Control, supra, the facts were very similar to the facts in the case at bar. That was an action brought by Gordon against the State Board of Control and the Warden of the state penitentiary to compel them to apportion and deliver to Gordon the number of convicts that it had contracted to give him. In discussing the question as to whether or not this was an action against the state itself, the Court said:

> "Although the state is not made a defendant *eo nomine*, it is, nevertheless, a proceeding against the state. The contract is made by and between the respondents, 'the State Board of Control, a public corporation acting for the State of West Virginia.' Thus by the very terms of the contract, the state is shown to be vitally interested in it. The State Board of Control is but the state's agent, and acted in making the contract for and in behalf of the state. A state can contract only through its constituted officers or agents. The purpose of the writ in this case is to compel the Board of Control to carry out the state's contract as made by said board, and is therefore, virtually a suit against the state, because the Board of Control is not interested in the contract otherwise than as the state's agent. Hence to compel it to perform the contract would be in effect to compel the

> state to do so. * * * The proceeding being one against the state's contracting agency, brought for the purpose of enforcing a contract made by it on behalf of the state, is therefore virtually a suit against the state itself, and cannot be maintained."

It will be noticed that in the above case as in the case at bar the contract was made by a state board or commission and it showed on its face that it was made for and in behalf of the state. If the present suit can be maintained on any theory, it is maintainable only on the theory that it is an action to compel the Highway Commission to carry out its contract that it made as a state agency, and to recover damages for an alleged breach of that contract. Thus it is clearly within the scope of the doctrine announced in the above decision, in that it is a "proceeding against the state's contracting agency, brought for the purpose of enforcing a contract made by it on behalf of the state, and is therefore a suit against the state itself."

The case of Mullen v. Regents of Education, supra, was an action brought by the plaintiff against "T. W. Dwight and others as members of and constituting the Board of Regents of Education of the State of South Dakota," to recover an alleged balance due for work and labor done and performed under a construction contract. The cause of action was thus identical with plaintiff's second cause of action in the case at bar, but in that case the contract did not show on its face that the state was a party thereto. The lower court gave judgment for the plaintiff. The Supreme Court reversed that judgment, held that it was in effect a suit against the State and therefore could not be maintained. The Court in its opinion uses the following language, which applies equally to the facts in the case at bar:

> "Title to state-owned educational property in this state is in the state, and not in the board of regents.

> The funds appropriated to pay the contractual obligations of the board of regents in relation to such state owned property are the state's moneys and under direct control of the state through its state auditor and state treasurer. The board of regents, although styled a corporation with certain powers and duties prescribed by statute law, is nevertheless only a state agent having only a nominal interest. They are not personally liable for the fulfillment of their contractual obligations—where not charged with acting unlawfully or in excess of authority. Any judgment that might be rendered in favor of plaintiff in a case like this could effectually operate only against the state funds under the control and in the hands of the state auditor and treasurer. We are therefore of the view that this suit is in essence and fact a suit against the State."

Petitioner respectfully submits that under the above authorities the State of Wyoming is the real party defendant and that this suit is in essence and in fact a suit against the State, and that, therefore, the federal courts were and are without jurisdiction.

V.

The State of Wyoming can not either by consent or by waiver confer jurisdiction upon the federal courts, where such jurisdiction has not been given by the Federal Constitution or Act of Congress.

This proposition is so self evident that we would not refer to it in this brief if it were not for the fact that respondent in its brief filed herein in resistance to the application for writ of certiorari insists that the State of Wyoming by creating the State Highway Commission and giving

it the power to sue and be sued in its own name, has waived its immunity from suit under the provisions of the Eleventh Amendment to the Constitution.

In support of the above proposition petitioner respectfully submits that

(1) The federal courts have only such powers and jurisdiction as have been conferred upon them by the Constitution and the Acts of Congress establishing them.

O'Neill v. Cooperative League, 278 Fed. 737;
Thomas v. University Trustees, 195 U. S. 207;
Bank of Washington v. Arkansas, 20 How. 530.

(2) Consent of parties can never confer jurisdiction upon a federal court, nor can any act of the legislature of any state confer jurisdiction upon a federal court where that jurisdiction does not otherwise exist.

Byers v. McAuley, 149 U. S. 608;
Minnesota v. Northern Securities Co., 194 U. S. 48;
Thomas v. Trustees of Ohio State University, 195 U. S. 207;
Bank v. Calhoun, 102 U. S. 256;
Railway Co. v. Swan, 111 U. S. 384.

We consider it unnecessary to review any of these authorities except the opinion of this Court in the case of Minnesota v. Northern Securities Co., as that opinion completely answers every claim of respondent.

In that case the action was originally filed in the state court but was removed to the United States Circuit Court, which heard the case on its merits and rendered a decree dismissing the bill. The case was then brought to this Court on appeal and after the case had been argued and briefs submitted, this Court asked the parties to submit further briefs upon the question as to whether the Circuit

Court of the United States could take cognizance of the case upon its removal from the state court.

In response to the suggestion of the Court, both parties submitted briefs in which they agreed that the federal court had jurisdiction and that the case was a removable one, and both sides insisted that this Court should consider and decide the questions involved upon their merits.

Thus, if a state may waive immunity from suit under the Eleventh Amendment and by consent confer jurisdiction upon a federal court, the State of Minnesota certainly did so in the above case. It not only appeared in the federal courts generally, but it also formally consented that this Court should hear and decide the case on its merits.

This Court, however, held that "consent of parties can never confer jurisdiction on a federal court" and that the Circuit Court was without jurisdiction, because a state is not a citizen, and it remanded the case to the Circuit Court of the United States for Minnesota with directions to that Court to remand it to the state court from which it had come.

VI.

If the State of Wyoming is the real party in interest in this action, then the grounds of jurisdiction as set forth in plaintiff's petition fail, because a State is not a citizen within the meaning of the Federal Constitution and the Acts of Congress.

The above proposition is conclusively established by the following authorities:

Postal Telegraph Co. v. Alabama, 155 U. S. 482;
Minnesota v. Northern Securities Co., 194 U. S. 48;
Ames v. Kansas, 111 U. S. 449;
Stone v. South Carolina, 117 U. S. 430;
Germania Ins. Co. v. Wisconsin, 119 U. S. 473.

However, the respondent has tried to avoid the force of the above doctrine by naming the individual members of the State Highway Commission and alleging that "the said persons constituting the said Highway Commission of Wyoming, and the said Commission, is each a resident and citizen of Wyoming." (R. 3)

Respondent in support of its contention relies upon the case of Thomas v. Board of University Trustees, 195 U. S. 207, and this case is cited in the majority opinion of the Circuit Court of Appeals. (R. 136) That case, however, is clearly distinguished in the dissenting opinion of Judge Scott. (R. 138) It can also be further distinguished from the case at bar in this: The Board of Trustees of Ohio State University was not only empowered "to have the general supervision of all lands, buildings and other property belonging to said college, and of receiving by gift, devise or bequest moneys, lands and other properties for its benefit", but in addition thereto, in that case, the facts were that certain lands were in the possession of this Board, and the Board as a Board claimed ownership thereof. The plaintiff brought an action for the partition of those lands and sought to have the title adjudicated as preliminary to the partition. The trial court found that the land belonged to the Board of Trustees of the Ohio State University. In that case, also, the question of the suit being a suit against the State of Ohio was not raised in any manner, nor was the Eleventh Amendment in any way referred to. The action had reference solely to lands the alleged title to which was in the Board of Trustees. The Board alone was the party in interest. Petitioner respectfully submits that the Thomas case is not an authority in point in this case, because of the difference in the facts of the two cases, but that this case is controlled rather by the decision of this Court in Murray v. Distilling Co., 213 U. S. 151.

In the latter case, two cases were consolidated for hearing, the other being Murray v. The Fleischmann Company. The bill of complaint in The Fleischmann Company case is set forth in full in the opinion of the Circuit Court of Appeals, 164 Fed. 1. It there appears that the case was entitled,

> "The Fleischmann Company, Complainant, v. W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Constituting the State Dispensary Commission of the State of South Carolina, and W. J. Murray, John McSween, B. F. Arthur, C. K. Henderson and Avery Patton, Individually, Defendants."

The bill of complaint rested the jurisdiction of the federal courts upon an alleged diversity of citizenship of the parties, and it contained the allegations that each of the individual defendants was a citizen and resident of the State of South Carolina, and that the complainant was a resident and citizen of the State of Ohio, thus complying with the rule as announced by this Court in the Thomas case so that the jurisdiction of the Circuit Court "sufficiently appeared as far as the pleadings were concerned."

Such being the facts as shown by the pleadings, what did the courts do? The trial court found for the plaintiffs, and the Circuit Court of Appeals affirmed its decree, but when the case reached this Court, it looked through form to substance and saw that the State was the real party defendant, instead of its agent, the State Dispensary Commission, the nominal defendant, and held that the federal courts were without jurisdiction, because the suits were in effect suits against the sovereign state of South Carolina and thus were within the inhibition of the Eleventh Amendment to the Federal Constitution.

The following quotation from the opinion of the Court in the Murray case is very significant and persuasive when applied to the facts as they appear in the case at bar:

> "We could not, therefore, sustain the exercise of jurisdiction by the circuit court without in effect deciding that the state can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied."

What is the case at bar but an attempt to compel the State of Wyoming to perform an alleged contract and to pay the Utah Construction Company for work and labor alleged to have been done and performed under that contract? It is admitted that the defendant Commission has no funds, no power of taxation and no means of paying any judgment.

VII.

Even if it be conceded that the State of Wyoming gave its consent to be sued in the federal courts by an action against the State Highway Commission, yet that consent was taken away by the Legislature of 1927, and when such consent was withdrawn, jurisdiction at once failed.

As has been heretofore shown, the Wyoming State Legislature in 1927 passed an Act amending Section 3025 of the Statutes, so as to provide that the State Highway Commission may be sued in the Wyoming courts "and in no other jurisdiction upon any contract executed by it."

It was admitted by respondent in the District Court and also in its brief filed in the Circuit Court of Appeals that the State Highway Commission is merely a state agency ex-

isting for governmental purposes, and that as such agency, it could not be sued except as provided in the statute creating it. But if the State Highway Commission is so far an arm or agency of the State of Wyoming that the legislature of that state can prescribe the courts where and the terms and conditions under which it may be sued, then it is so far an arm or agency of the state that the state may withdraw at any time the consent given, or hedge it about with new terms and conditions. There can be no other conclusion from the authorities. Hence the Legislature of 1927 had the right to prescribe in what courts the Commission might be sued.

As has been shown, the State of Wyoming created the State Highway Commission as an arm or agency of the state itself. It is not a body corporate, nor has it any status in any court except such as has been given it by the statute creating it. It is neither a natural nor an artificial person. It is not even a legal entity, except in so far as it is made such by statute. Certainly when the Wyoming State Legislature of 1927 provided that said Commission could be sued only in the state courts and in the courts of no other jurisdiction, it violated no contractual rights of the plaintiff.

It is elementary that a law providing that the State may be sued in certain cases or in certain courts is not a contract, and that such a law may be modified or repealed even while an action which has been brought under such law is pending. See the following cases:

Beers v. Arkansas, 20 How. 527;
In re Ayers, 123 U. S. 443;
Hans v. Louisiana, 134 U. S. 1;
Ex Parte State, 52 Ala. 235;
Railroad Co. v. Tennessee, 101 U. S. 337;
Railroad Co. v. Alabama, 101 U. S. 832;

Baltzer v. North Carolina, 161 U. S. 240;
South Carolina v. Gaillard, 101 U. S. 433;
In re McCardle, 7 Wall. 514;
McDowell v. Fuller, 169 Mich. 332, 183 Mich. 639;
Ball v. Halsell, 161 U. S. 72.

We will not review any of these authorities. This question is exhaustively discussed by this Court in the cases of Beers v. Arkansas and Railroad Co. v. Tennessee, supra, and the reasons for the rule stated. The case of McDowell v. Fuller, supra, is more nearly parallel to the case at bar than any of the cases decided by this Court, but that case is reviewed on Pages 43 to 45 of our brief accompanying the petition for certiorari and will not again be reviewed here.

Conclusion

On Pages 46 to 50 of our brief accompanying the petition for certiorari filed herein, it was shown that the majority opinion of the Circuit Court of Appeals is self contradictory. The argument therein contained will not be here repeated, yet we wish again to call the Court's attention to the fact that the Circuit Court of Appeals ignored the plain provisions of the Act creating the State Highway Department (Session Laws of Wyoming, 1919, Chapter 132) and also ignored all the provisions of the original contract which designated the parties to that contract (R. 71 to 75) and bases its decision upon the fact that in the Supplemental Agreement (R. 75) the original contract is referred to as one entered into "between the State Highway Commission of Wyoming and the Utah Construction Co."

Now, a supplemental agreement by its very nature does not in any way destroy or abrogate the original contract,

but merely supplements the same,—adds something thereto. The two must be read together so as to get the entire agreement, and if there is anything that appears contradictory therein, that construction must be given which will harmonize them and give effect to every phrase and clause.

The original contract recites that the State of Wyoming was acting through the State Highway Commission, the contract was signed by the State Highway Commission and its seal attached, and such being the facts there is no question but that the contract was entered into between the "State Highway Commission of Wyoming and the Utah Construction Company", as recited in the first paragraph of the supplemental agreement, but it was entered into by the State Highway Commission as agent acting for and in behalf of the State of Wyoming.

Another fact that is very persuasive but that has been referred to only incidentally in the foregoing argument is the fact that the road to be built under this contract was and is a federal aid project. At the very beginning of the contract (R. 71) we find the words, "Fed. Aid No. 118", and Paragraph 1 of the contract expressly provides that said road is to be constructed "under the direct supervision of the State Highway Commission, subject to inspection at all times and approval by the Secretary of Agriculture, pursuant to the Act of Congress approved July 11, 1916, entitled 'An Act to Provide that the United States shall Aid the States in the Construction of Rural Post Roads and for other Purposes' ". (R. 72)

Federal aid in the construction of highways was not given by the above Act of Congress to individuals, or to any arm or agency of the State, but such aid is given to the States and the States alone. This fact shows conclusively that the highway here in question was built by the State of Wyoming, that the contract for its construction was the contract

of the State of Wyoming and any suit on that contract is a suit against the State of Wyoming, however it may be entitled.

For the reasons hereinbefore set forth, petitioner respectfully submits that this action is an action against the sovereign State of Wyoming, and that, therefore, the United States District Court for the District of Wyoming was and is without jurisdiction; and that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be reversed and set aside and the judgment of the District Court affirmed.

Respectfully submitted,

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Appendix

The following are those portions of the Wyoming Compiled Statutes of 1920 which have a material bearing upon the questions under discussion:

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years. * * * The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the 'State Highway Commission of Wyoming,' and may be sued by such name in any Court upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all actions and appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words 'State Highway Commission of Wyoming, Official Seal.''

"Section 3026. The Commission shall appoint a State Highway Superintendent, with a salary to be fixed by the Commission, payable in equal monthly installments. He shall be experienced and skilled in highway and bridge construction and maintenance; shall be allowed his actual and necessary traveling and other expenses incurred in the discharge of his official duties, and shall give his entire time to the duties of his office. Before entering upon the duties

of his office he shall take the constitutional oath of office and give bond to the State of Wyoming in such amount and with such surety as may be approved by the Commission, conditioned upon the faithful discharge of his duties and his accounting for all property, material and records in his control. Under the supervision of the Commissioner he shall have complete charge of laying out and establishing highways upon which any portion of the State Highway Fund is to be expended, except on those highways constructed, improved or maintained in co-operation with the Secretary of Agriculture of the United States under Section eight of the Act of Congress or other Federal Act or Acts specifically authorizing the use of Federal Funds to build roads within or partially within the national forests, and with the approval of the Commission shall purchase all materials, supplies and equipment, including road building machinery, materials, supplies and equipment, and shall employ such engineers, superintendents and employees with salaries to be approved by the Commission, as may be necessary for the proper performance of the duties of the Commission and the construction work undertaken by it."

"Section 3027. All road and bridge construction work, any part of the cost of which is paid from the state highway fund shall be performed in accordance with the plans and specifications prepared by the state highway superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the state highway superintendent shall have complete charge thereof, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or partially within the national forests."

"Section 3028. It shall be the duty of the state highway commission from time to time to designate public highways to be known as state highways, which may coincide in whole or in part with country roads theretofore legally established, and whenever such state highway shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties, in so much of the road and right of way as shall be so designated shall pass to and vest in the state of Wyoming."

"Section 3029. Excepting as such work may be performed in cooperation with the secretary of agriculture of the United States as hereinafter provided, the construction and maintenance of all state highways, including all bridges, and culverts thereon, shall be performed at the expense of the state and by and under the supervision of the commission and the state highway superintendent."

"Section 3031. The legislature of the state of Wyoming, hereby assents to the provisions of the act of Congress approved July 11th, 1916, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' together with all acts and legislation amendatory thereto or supplementary thereto or which shall grant or authorize aid for the construction, improvement, maintenance or repair of public roads or highways. The state highway commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of roads under the provisions of the said act or acts of congress to submit such scheme or program of construction or maintenance as may be required by the secretary of agriculture and to do all other things necessary fully to carry out the cooperation contem-

plated and provided for by the said act or acts, for the construction or improvement of highways under the said act, the good faith of the state is hereby pledged to make available funds sufficient to equal the sums apportioned by the state by or under the United States Government during each of the years for which federal funds are appropriated by section 3 of said act, and to maintain the roads so constructed with the aid of funds appropriated and to make adequate provisions for carrying out such maintenance. * * * If the road to be improved under such cooperative agreement is a state highway, the state's share of the expense shall be borne entirely by the state."

"Section 3034. There is hereby created a fund to be known as the state highway fund, to the credit of which the state treasurer, who is hereby designated as the state official to receive all amounts paid by the United States under the said act of Congress approved July 11, 1916, shall place all moneys heretofore received for said fund, all money hereafter received from the United States, under cooperative agreements as hereinbefore authorized, all money derived from taxes levied for such purpose or appropriated for said fund, all moneys received from the sale of state bonds for highway construction or improvement, all money received from the counties under cooperative agreements as hereinbefore authorized, and all other moneys received from donations or bequests which may be accepted by the commission on behalf of the state of Wyoming, or from any other source designated by law for that purpose. All moneys in said fund shall be available for the purposes of this chapter without further appropriation and no warrant shall be drawn thereon excepting on voucher approved by the state highway superintendent."

"Section 3035. Appropriation. There is hereby appropriated to the state highway fund in the state treasury not otherwise appropriated, the sum of three hundred thousand dollars which shall be made available upon the passage of this chapter, and the additional sum of three hundred thousand dollars which shall be available on March first, 1920."

"Section 3020. For the purpose of providing funds for the construction and improvement of public roads and highways in Wyoming, the state treasurer, with the approval of the governor is hereby authorized from time to time within the limits of the amount authorized by law to issue and dispose of bonds of the State of Wyoming to be designated as highway bonds."

"Section 3021. Such bonds shall bear date and may be issued in such amounts and bearing such rates of interest * * * as shall be determined by the governor and state treasurer. * * * They shall be signed by the governor and attested by the secretary of state under the seal of the state and countersigned by the state treasurer."

In 1927, Section 3025 of the Wyoming Compiled Statutes, 1920, supra, was amended and re-enacted so as to read as follows: (Ch. 61, Sec. 1.)

"Section 3025. There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years; provided, that upon the passage of this chapter, the governor shall appoint two commissioners for the term of two years, two commissioners for the term of four years,

and one commissioner for the term of six years. One commissioner shall be appointed from each of the following described districts: District No. 1, composed of the counties of Laramie, Albany, Platte and Goshen; District No. 2, composed of the counties of Carbon, Sweetwater, Uinta, Lincoln, Sublette and Teton; District No. 3, composed of the counties of Niobrara, Converse, Natrona and Fremont; District No. 4, composed of the counties of Hot Springs, Washakie, Big Horn and Park; District No. 5, composed of the counties of Sheridan, Johnson, Campbell, Crook and Weston. If any commissioner shall cease to be a resident of the district from which he is appointed, his office shall be vacant; all vacancies from any cause shall be filled by appointment by the governor for the unexpired term. Each of said commissioners shall qualify by taking the constitutional oath of office and each shall receive a salary of six hundred dollars per year and his actual and necessary traveling expenses while away from his home in the performance of the duties of his office, to be paid from the state highway fund hereinafter provided. The commission shall maintain offices in the state capitol which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the "State Highway Commission of Wyoming", and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all action—and shall also appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words "State Highway Commission of Wyoming, Official Seal," and all copies of all records and other instruments in the office of the commission, certified under

the hand of its secretary with said seal affixed shall be received in any court as prima facie evidence of the original record or instrument."

The following sections of the Wyoming Compiled Statutes of 1920, defining the duties of the State Auditor and the State Treasurer, have also an important bearing on the questions before the court, when taken in connection with the statutes relative to the State Highway Fund:

"Section 118. The State Auditor shall:

First—Audit and settle all claims against the state payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers and persons.

Second—Draw all warrants upon the treasurer for money.

Third—Express in the body of any warrant which he may draw upon the treasurer, for money, the particular fund appropriated by law out of which the same is to be paid.

Sixth—Keep an account of all debts and credits between the state and the United States, and between the state and every other state, sovereignty, community, officer or person, with whom the state may have dealings, and of any separate fund in the state authorized by law."

"Section 131. The State Treasurer shall:

First—Receive and keep all moneys of the state, not expressly required by law to be received and kept by some other person.

Second—Pay all warrants duly and legally issued by the auditor so long as there are in his hands funds sufficient to pay such warrants; Provided, That his payment for any purpose shall in no case exceed the amount appropriated for such purpose.

Third—Keep a just, true and comprehensive account of all money received and disbursed.

Fourth—Keep a just and true account of each head of appropriation made by law, and the disbursements made under the same.

Fifth—Render his account to the auditor for settlement quarterly, or oftener if required."

"Section 132. The treasurer shall in no case disburse or pay out the state funds except on warrants drawn by the auditor. Any violation of the provision of this section shall be deemed a felony and upon conviction thereof, the perpetrator shall be punished by a fine of not more than three thousand dollars and by imprisonment for not more than five years in the penitentiary."

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APR 5 1928
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. ~~852~~ 96

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

Respondent's Brief in Resistance to Application for Writ of Certiorari.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. 852.

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

Respondent's Brief in Resistance to Application for Writ of Certiorari.

STATEMENT.

Utah Construction Company brought this action in the United States District Court for the District of Wyoming to recover damages against The State Highway Commission of Wyoming for breach of contract, alleging that the Commission had entered into a contract with the Construction Company by which the Construction Company

was to construct a certain highway at a fixed rate per yard, according to a certain surveyed line or course along Wind River Canyon in Wyoming. Under this construction contract the stakes fixing the grade and alignment, as surveyed, were to be fixed by the Commission, and these contractor was to follow. After the making of the contract, and in violation of the obligation imposed thereby to stake out the line in accordance with the survey, the Commission, without notifying the plaintiff, and without its knowledge, made a new survey and restaked the line of the highway so that the construction thereof became much more difficult and expensive.

Jurisdiction of the United States District Court was invoked under *section 24 of the Judicial Code* (U. S. Code, section 41, subdivision 1) confe ring original jurisdiction where the matter in controversy is between citizens of different states, it being alleged in the complaint, or petition, that the plaintiff, Utah Construction Company, was a corporation and resident of the state of Utah, and that The State Highway Commission of Wyoming, and its individual members, were citizens and residents of the state of Wyoming.

A demurrer on the ground that the United States District Court was without jurisdiction was sustained, resulting in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which in the present proceeding is sought to be reviewed.

That the District Court had no jurisdiction over the subject matter was based upon the claim that the real defendant in the action was not The State Highway Commission of Wyoming, but the state of Wyoming itself, and, since a state is not endowed with citizenship, that there

was not the requisite diversity of citizenship appearing in the record to confer jurisdiction.

On the other hand, the Utah Construction Company contended, and here submits, that The State Highway Commission of Wyoming, as constituted by the Legislature of Wyoming, is a juristic body with certain individual attributes and functions, and especially endowed with the right to execute contracts in its own name and over its own seal, and to sue and be sued in its own name. Such juristic body, for the purpose of conferring jurisdiction upon the court, must be held to be a citizen of Wyoming under the purview of *section 24 of the Judicial Code*, either by virtue of the fact that the Commission is a *quasi* corporation, or if not a *quasi* corporate body, then by virtue of the fact that it is a collective body of individuals each of whom is a citizen of Wyoming.

The statute of Wyoming creating The State Highway Commission is quoted in the opinion of the Circuit Court of Appeals at pages 122-125 of the transcript of record. An analysis of this act of the Legislature of Wyoming shows that the body thus created is not the state itself, but a separate, individual and distinct juristic being expressly created for the purpose of litigating rights arising out of its own contracts.

The act creates the State Highway Department, consisting of a State Highway Commission and a state highway superintendent. The Commission is to be composed of five commissioners appointed from five highway districts in the state. [Sec. 3025.]

The use of the term "department" in the act is in a sense misleading. For the Highway Commission is some-

thing more than a part of a mere department of the state. It is a juristic entity, as the following provisions indicate:

> "The commission shall have the power to sue in the name of 'the State Highway Commission of Wyoming,' and may be sued by such name in any court upon any contract executed by it." [Sec. 3025.]

> "The attorney general shall prosecute and defend all actions and appear in all proceedings in any federal department in which the commission *shall be a party* or be interested." [Sec. 3025.]

> "The commission shall have an official seal, bearing its name, and under such seal may certify its records, which, so certified, shall be received in the courts as *prima facie* evidence of the original document." [Sec. 3025.]

The possession of a seal, apart from the seal of the state, the right to sue and be sued in its own name, and to appear as a party to a proceeding, import a separation from the state, and a corporate dignity and responsibility.

The Commission has the power to contract for the construction of highways *"any part of the cost of which is paid from the state highway fund."* [Sec. 3027.] Under this section authority is given to let contracts for county highways, providing any portion of the same is paid from the state highway fund, thus placing upon the Commission the duty of performing a county function as distinguished from a strictly state work.

The Commission shall have the authority to acquire rights-of-way for state highways "by purchase or gift," and if such necessary rights-of-way cannot be so acquired, the Commission shall have the authority to acquire the same by condemnation proceedings "in the same manner as is provided by law for the condemnation of rights-of-

way for railroad purposes." The manner of condemning rights-of-way by railroads is prescribed by chapter 314, section 3897, of the Wyoming Compiled Statutes, 1920. Section 4893 of the Wyoming Compiled Statutes, 1920, existing at the time of and since the enactment of the act of 1919 creating The State Highway Commission, provides that "The state, the counties, and each municipal corporation shall have power to purchase or acquire by condemnation any real estate, including streets, alleys or public highways, * * * which power of condemnation shall be exercised in the manner prescribed by law for the condemnation of real estate by railroad corporations." It is significant that the state, having provided for the exercise of eminent domain by itself in a particular manner, should thus expressly grant to the Commission the power to exercise this right in the manner the same is exercised by "the state, the counties, and each municipal corporation."

The Commission shall have power to enter into agreements with counties for co-operative work upon county roads, but such work shall not be commenced until the county has entered into an agreement with the Commission to pay not less than half the total cost of such work to the state. [Sec. 3030.]

Co-operative agreements with the United States under the so-called Federal Aid Act shall be made with the Secretary of Agriculture only by the Commission, *"but may be for the construction or improvement of either a state highway or a county road* * * *. If the highway to be so improved or constructed under such co-operative agreement is not a state highway, the state's share of the cost of such work shall be divided between the state and

the county upon such basis as the Commission shall determine." [Sec. 3031.]

For the use of this Commission a special fund is provided, known as "the state highway fund." The custody of this fund is in the state treasurer, but it is to be kept separate from other funds in his possession. No warrant shall be drawn upon such fund except on voucher approved by the state highway superintendent, an appointee of the State Highway Commission. [Sec. 3034.] This fund is made up of money collected from taxes, money appropriated by the Legislature, money received from state highway bonds, money received from the counties under co-operative agreements made with the Commission, money received from donations accepted by the Commission on behalf of the state, and money received from any other source designated by law for that purpose. [Sec. 3034.]

The balance remaining in the state highway fund at the close of any annual or biennial shall not revert to the general fund of the state, but shall remain in the state highway fund and be subject to subsequent expenditures.

This fund, we believe, has all the characteristics of a special endowment; it is derived from many sources; it is not mingled with other moneys; it is subject only to disposal upon the order of the state highway superintendent, an appointee of the Commission.

It was contended in the Circuit Court of Appeals that the Commission thus created is a *quasi* corporate body, and as such is endowed with citizenship within the meaning of *section 24 of the Judicial Code,* and in support of this contention the following authorities were cited: *Lincoln County v. Luning,* 133 U. S. 529; *Madden v. Lan-*

caster County, 65 Fed. 191; *Butterfield v. State Industrial Accident Commission*, 223 Pac. 941; *Bromwell Co. v. State Board of Charities and Corrections*, 279 Fed. 440; *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409; 43 *Corpus Juris*, 73, and numerous other authorities.

If not a *quasi* corporate body, it was pointed out that the Commission is a collective body of individuals forming a juristic entity, specially empowered by statute to sue and be sued in its own name, and as such entity has a citizenship, within the purview of *section 24 of the Judicial Code*, dependent on the citizenship of its members; citing on this point the case of *Thomas v. Trustees of Ohio State University*, 195 U. S. 207.

The opinion of the Circuit Court of Appeals [Tr. 131] ignores the point that the Commission is a *quasi* corporate body, and bases the citizenship of the Commission upon the rule of *Thomas v. Board of Trustees* [*supra*].

ARGUMENT.

1. There Is No Special Ground in This Case Upon Which the Court Should Exercise Its Jurisdiction to Issue Its Writ of Certiorari.

When analyzed and properly understood, this case has about it nothing that is unique, novel or of any general public interest. It is a suit against The State Highway Commission of Wyoming, a body which, by the act creating it, may sue and be sued by that name. Jurisdiction of the court depends upon diversity of citizenship. To uphold or overthrow this jurisdiction it is necessary merely to determine whether the Commission is what the act says it is, a body that may be sued in its own name,

or is not a body and may not be sued in its own name, but is, in fact, the state itself, having no individuality of a juristic nature which this court will recognize as constituting citizenship.

It should be expressly noted that the suit is not a suit against state property, thus requiring the state to be brought in as a necessary party. It is a suit to recover a judgment against the Commission, which the statute expressly states may be recovered. The suit is not one to recover a judgment which will be binding on state property or on state funds. There is nothing about the prayer for relief nor the allegations of the complaint which shows any intention or right on the part of the plaintiff to collect its judgment out of property of the state. The Circuit Court of Appeals, indeed, has expressly said, although we think in error, that the Commission has no property out of which the judgment can be collected; and, while the question as to the collection of the judgment is not now involved, as we believe, it is admitted that no judgment secured against the Commission can be collected unless the Commission has property in its own name, or the state hereafter supplies a fund to the Commission for the payment of judgments against it, or has already, through appropriate legislation, dedicated to the Commission a fund out of which judgments against it may be paid.

Thus considered, the question becomes merely one of necessary parties before the court. Are we correct in bringing the Commission before the court and asking for a judgment against it, or must we bring the suit against the state itself by its own name, and (since the state is not a citizen) in its own courts?

We do not believe that the question thus presented will warrant the exercise of jurisdiction to issue the writ of certiorari "which should be exercised sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions."

Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251;
Forsyth v. Hammond, 166 U. S. 506.

2. Cases in Respect to the Application of the Eleventh Amendment to the Constitution of the United States Do Not Apply to the Question of Citizenship Here Involved.

Many cases are cited under division 1 of petitioner's brief in which it has been held that the state is a party within the meaning of the Eleventh Amendment. While all of these cases can, we think, be distinguished upon another ground, it is sufficient to point out that in the present instance we are not considering the principle underlying the application of the Eleventh Amendment. The statute of Wyoming creating the Commission expressly provides that the Commission may sue and be sued in its own name. Insofar as the state has any interest in this controversy, it has, by such provision, expressly waived its immunity from suit. It is not denied that a waiver of this immunity from suit avoids any objection to the jurisdiction made under the Eleventh Amendment. [See Opinion of District Court, Tr. at p. 103, at p. 110.]

The question as to whether the state is a party where the immunity of the Eleventh Amendment is claimed, is very different from the question as to whether or not the state is a party where the question is one of citizen-

ship under the requirement of *section 24 of the Judicial Code.*

The Eleventh Amendment was enacted in response to the public clamor over the decision of the Supreme Court in *Chisholm v. Georgia,* 2 Dill. 419 (*Hans v. Louisiana,* 134 U. S. 1 at 10-17). The amendment has, therefore, been given a broad and liberal construction with the view of protecting the state's immunity, and restricting the jurisdiction of the Federal Court. But *section 24, subdivision 1, of the Judicial Code,* providing for jurisdiction through diversity of citizenship, has been given a broad and liberal construction with the view of upholding the court's jurisdiction.

The rule with respect to the application of the Eleventh Amendment has been thus expressed:

> "To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents and representatives, where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."
>
> *Regan v. Farmers Loan & Trust Company,* 154 U. S. 362.

But it is a general rule, where diversity of citizenship is claimed, that the matter is governed by the citizenship of the parties to the record. The mere fact that a party appears in a representative capacity, or that he has no

independent interest in the controversy, does not preclude the assertion of his citizenship as a ground of jurisdiction.

> "We have repeatedly held that representatives may stand upon their own citizenship in the Federal Court, irrespective of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc."
>
> *Mexican Central R. Co. v. Eckman,* 187 U. S. 429.

The personal interest of the party to the record in the effect of the suit is usually regarded of no importance, provided merely that the law gives him the right to sue or be sued in his representative capacity. Thus an executor or administrator has no title to the real property under his control, but such property passes directly to the heir. And yet, neither the fact that an executor or administrator was appointed in the state of which the opposite party is a citizen, nor the fact that the beneficiary whom the executor represents may be a citizen of the same state as that wherein the opposing party is domiciled, affects the question of diversity of citizenship. The domicile of the executor governs his citizenship irrespective of the domicile of the interested parties.

Childress v. Emory, 8 Wheat. 642, 669;
Rice v. Houston, 13 Wall. 66;
Blake v. McKim, 103 U. S. 336;
Dodge v. Perkins, Fed. Case No. 3954;
Hartman v. Fishbeck, 18 Fed. 291;
Wilson v. Hastings Lumber Co., 103 Fed. 801;
McDuffie v. Montgomery, 128 Fed. 105.

A receiver is a mere officer of the court and has no title to the property of the corporation over which he is appointed, and no interest therein except to administer upon the same, yet it is the citizenship of the receiver, and not the citzenship of the corporation which governs.

Smith v. Rackliffe, 87 Fed. 964;
Coal & Iron Ry. Co. v. Reherd, 204 Fed. 859;
Brisenden v. Chamberlain, 53 Fed. 307.

Although the guardian of a minor has no title to the property in his custody (*Lamar v. Micou,* 112 U. S. 452), yet where the guardian by state law may sue in his own name, it is his citizenship, and not the citizenship of the ward, which governs where federal jurisdiction is invoked solely on the ground of diversity of citizenship.

Mexican Central R. Co. v. Eckman, 187 U. S. 429.

The cases cited on page 30 of petitioner's brief are all cases in which the question involved was the immunity furnished by the Eleventh Amendment. For the reasons stated, the rule laid down in them is not the rule which must govern here.

But, assuming that the rule under which the state must be decided to be or not to be a party to this litigation is the same in cases involving the Eleventh Amendment and cases involving merely diverse citizenship, still the authorities cited under subdivision 1 of petitioner's brief are inapplicable for the following reason: That all of such cases are cases in which the action was brought either directly against property of the state, or the necessary result of the action would be to alienate the state from its property without its consent; or else, as in the

case of *Hagood v. Southern,* 117 U. S. 52, the object of the suit was to seek the performance of a state contract by compelling state officers to perform an obligation belonging to the state in its political capacity.

The case of *Smith v. Reeves,* 178 U. S. 436, much relied on in the brief of Petitioner and cited in the dissenting opinion of Judge Scott in the instant case, is an instance of an action brought against a state officer for the purpose of securing the possession of state property. The action was brought against Reeves as state treasurer to compel him to pay out state money, and obviously, as said by the court, "Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

Murray v. Wilson Distilling Company, 213 U. S. 151, is a case of the same pattern as the *Reeves case,* cited above. The suit was to compel payment to the plaintiff of money which the court held was the property of the state. The effect of the judgment in such a case would be to deprive the state of its property and compel the state to specifically perform its contract. The principle in the *Reeves case* and the *Wilson Distilling Co. case* is but an application of the rule that where the right to property is involved the owner of the property must be made a party to the action. But, as noted, there is in the present case no suit to recover state property, and no prayer for a judgment which, by its terms, will require the turning of state property into the hands of the Utah Construction Company.

3. It Is No Objection to the Present Suit That It Is Brought Against a State Agency.

It is argued that The State Highway Commission is a mere agent of the state of Wyoming, and since a judgment cannot be rendered against an agent, individually, on a contract which he has entered into in the performance of his principal's business, no judgment can be rendered against the Commission arising out of a contract entered into by it in the interest of the state. But this is but a confusion of legal principles. It is true that a mere agent entering into a contract for his principal will not be personally bound. But there is a difference between a mere agent and a juristic entity constituting an agency for the performance of a certain governmental and administrative function, with the right to sue and be sued in its own name.

Thus, a county is a mere agency or arm of the state government; it is "nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the power of government." (*Maryland v. Baltimore etc. R. Co.*, 3 How. 534, 549.) "Such corporations are the mere creatures of the legislative will * * *. They are but subdivisions of the state, deriving even their existence from the Legislature. Their officers are nothing more than local agents of the state." (*Board of Commissioners of Laramie Co. v. Board of Commissioners of Albany County*, 92 U. S. 307.)

Yet a county has a citizenship and a separate individuality, and, when authorized by statute, may sue and be sued, and in such suit is not to be regarded as the state even when the Eleventh Amendment is invoked.

Lincoln Co. v. Luning, 133 U. S. 529;
Chicot Co. v. Sherwood, 148 U. S. 529.

"Suppose," says the brief of petitioner, "that instead of designating the State Highway Commission to enter into contracts for the construction of state highways, the Legislature had seen fit to designate an individual, as, for instance, the Secretary of State, to exercise the powers conferred by the State Highway Act upon the State Highway Commission. According to the opinion of the Court of Appeals, an action would lie against the Secretary of State on such contract, and yet, according to the same opinion, he would not be personally liable thereon." This argument overlooks the difference between a state officer acting for the state and a juristic entity created by the state for the purpose of expressly performing, in its own name, a certain state and county function. A suit against the State Highway Commission in its own name is expressly authorized by the statute. Insofar as the litigation itself is concerned, the state has divorced itself from the right to mingle in the litigation or to assert any interest which it may have in the same by virtue of the fact that a judgment is sought against its creature. The Commission which it has created has been given "a local habitation and a name"; one of the very objects of its creation is the power to sue in that name and in its own interest. If it were possible for the state by its legislation to so endow the Secretary of State, then he, too, could be sued in his own name, and as a separate juristic person, and the state could not be heard to say that the authority which had been given for such suit was "a mere gesture."

The Circuit Court of Appeals properly held that the individual members of the State Board of Highway Commissioners are not subject to suit in the present ac-

tion. The suit must be brought against them as a board, and not against them as individuals. By a like token, a suit against the Secretary of State based upon an authorized state contract which he had entered into, if brought at all, must be brought against him in his official capacity. But no authority to bring suit against him in any official capacity is given. In his official capacity he is the state itself, not an arm of the state nor an agency of the state, and has no powers delegated to him except it be in the name of the state.

4. Decisions of the Supreme Court of Wyoming Cited Are Not Binding Because They Are on Matters Affecting the Federal Court's Jurisdiction. They Are Not Applicable on Other Grounds.

Under division 3 of petitioner's brief, *Hjorth Royalty Company v. Trustees,* 30 Wyo. 309 (222 Pac. 9), and *Franzen v. Southern Surety,* 35 Wyo. 15 (246 Pac. 30), are cited. The *Hjorth case* is given as authority for the proposition that "a suit against a department of the state government or a board or corporation created by the state for governmental purposes, is a suit against the state." The *Franzen case* is cited as a direct decision by the Supreme Court of Wyoming to the effect that a contract made by the State Highway Commission is a contract by the state of Wyoming, and that such construction is binding on the Federal Court.

Hjorth Royalty Company v. Trustees of University, 30 Wyo. 309, was a decision made specially upon the facts before the court. The facts were that the plaintiff sought to quiet title to certain real property owned by the state itself, and inasmuch as the state had not con-

sented to be sued, such action against its property could not be brought. Here again is but another illustration of the general rule that where the subject of an action is property the owner of the property is an indispensable party to the litigation.

Franzen v. Southern Surety Company does not contain a decision but a mere expression, or dictum, that a contract by the State Highway Commission was a contract of the state of Wyoming. It appears that the State Highway Commission had entered into a certain contract with a contracting firm for the construction of a public highway. The contractors had given a bond in which the Southern Surety Company had bound itself to pay for all material used in connection with said work. Action was commenced by a materialman against the bondsman. In defense of the action it was contended that the bond had been required of the contractors under the provisions of a certain statute of Wyoming, and that insofar as the statute required a bond to insure the payment for materials which did not actually go into the work itself and enhance the value of the property, there had been an unconstitutional invasion of the liberty to contract. But the court held that while the Legislature did not have the power to require a bond of the kind indicated in construction contracts made between private persons, a public body did have the right to require such a bond. In deciding this question the court held that the contract was with a public body because executed by the Commission, one of the departments of the state itself. The question as to whether the Commission, under the statute creating it, was the state itself, in the sense contended for by the petitioner in the instant case,

was not considered by the court and not decided. Nor was such decision necessary to the adjudication of the matter before the court. The statute creating the State Highway Commission was not mentioned or construed. The statement that the Commission was the state itself was obviously used in the broad and general sense in which it can be said that a county, being an arm of the state government, is a part of the state itself. A mere dictum of this sort is not a decision of a state statute which is binding upon the federal courts.

> "If the construction put by the court of a state was not a matter in judgment; if it might have been decided either way without affecting any right brought into question, then, according to the principle of the common law an opinion on such question is not a decision."
>
> *Carroll v. Carroll*, 16 How. at 286, 14 L. Ed. 941.

See, also:

> *Southern Railway Company v. Simpson*, 131 Fed. 705, at 709.

But, if the *Franzen case* and the *Hjorth case* are to be taken as setting forth the rule for which they are cited, still they are not binding upon the Federal Court; for the question as to whether this suit is or is not a suit against the state is a jurisdictional question and on matters involving its jurisdiction this court is not bound by the decisions of the state court.

> *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437;
>
> *Southern Photo Material Co. v. Eastman Kodak Co.*, 224 Fed. 523;
>
> *Thomas v. Trustees of Ohio State University*, 195 U. S. 207.

5. The Amendment to the Act Creating the Commission, Passed by the Wyoming State Legislature in 1927, Did Not Deprive the Federal Court of Jurisdiction.

In the year 1927, after the present suit had been filed and the State Highway Commission had appeared and filed its answer, the Legislature of Wyoming amended section 3025 of the Wyoming Compiled Statutes of 1920 so as to provide that the State Highway Commission might be sued in the Wyoming courts and "in no other jurisdiction, upon any contract executed by it."

Under the authority of *Beers v. Arkansas,* 20 How. 527, it is said in petitioner's brief that this subsequent act of the Legislature deprived the Federal Court of all jurisdiction to proceed in the action.

The position thus taken assumes that the present suit has, in fact, been brought against the state of Wyoming. It is true, as decided in *Beers v. Arkansas,* that even where the state gives consent to be sued, it may limit its consent to a particular tribunal in which the action must be brought.

But if, as we contend, the state of Wyoming has created a Commission with the attributes and elements of citizenship, if it has created a juristic entity of a suable nature, it cannot restrict jurisdiction to its own courts over a body thus created.

Chicot County v. Sherwood, 148 U. S. 529;
Barrow v. Kane, 169 U. S. 517.

In the latter case the court, considering an attempt of a state to confine suits against a suable party to its own courts, says:

"The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of the state. Hyde v. Stone, 20 How. 170-175; Smith v. Ames, 169 U. S. 466. It has therefore been decided that a statute which required all actions against a county to be brought in the county court, does not prevent the Circuit Court of the United States from taking jurisdiction of such an action, Chief Justice Chase saying that 'no statute of limitation of suability can defeat a jurisdiction given by the Constitution.' "

6. The Contract Which Forms the Basis of the Action Is Not, by Its Terms, a Contract Between the State of Wyoming and the Utah Construction Company, But Is a Contract of the State Highway Commission of Wyoming. The Question, Moreover, as to the Construction of This Contract Is a Question of No Public Importance and Dependent Upon the Peculiar Facts of the Transaction.

It is true that the testimonium clause of the written contract between the parties recites that the instrument is executed by the state of Wyoming acting through its State Highway Commission.

But the contract is to be construed with reference to its own provisions, and to the construction thereafter placed upon it by the contracting parties.

The act creating the Commission provides for the making of these contracts by the Commission. Aside from the formal contract, which was merely the expression of the parties as to the agreement theretofore entered into, the contract includes the proposal of the Utah Construction Company to do the work. This proposal is made

to The State Highway Commission of Wyoming [Tr. 66]. The contract itself is the acceptance of this proposal. The decision of the Circuit Court of Appeals points out various internal evidences in the instrument indicating that it was the intention of the parties that the contract should be between the Commission and the Utah Construction Company. Most persuasive of these internal evidences is the definition of the contract itself found in the specifications which are incorporated into the formal contract as a part thereof: "6—Contract. The agreement between the contractor and The State Highway Commission covering the work to be performed, and including the plans and specifications." [Tr. 15.] After the making of the formal contract the parties entered into a supplemental contract in which it is recited that the original contract had been entered into "between The State Highway Commission of Wyoming and the Utah Construction Company."

The opinion of the Circuit Court of Appeals is obviously correct in holding that the contract, viewed from its four corners, was the agreement between the contractor and the Commission.

The question as to who were the parties contracting is, moreover, one dependent upon the peculiar facts of the present transaction. It has no public importance. Its decision invokes no new or novel principle. It clearly cannot form the foundation for the exercise of this court's jurisdiction as prayed for in the present proceeding.

7. The Fact That the Commission Has No Property Out of Which a Judgment Against It May Be Paid, Is of No Importance in the Decision of the Jurisdictional Question Here Involved.

The Utah Construction Company is claiming the right in this action to secure a judgment against the State Highway Commission. Whether the Commission has or has not property out of which this judgment may be paid should not, in just reason, deprive us of our right to secure the judgment. It does not affect the jurisdictional question involved except only insofar as it may be taken as an aid to the construction of the statute sought to be placed upon it by petitioner to the effect that no suit against the Commission is permitted.

The District Court of Idaho, per Judge Dietrich, speaking on the right to sue the regents of the University of Idaho, uses the following language applicable to this phase of the question:

> "The objection is urged that, if a judgment is rendered against the defendant, it follows that the court may direct the seizure and sale of its property —that is, of the university—in order to satisfy the judgment, and that no such result could have been contemplated by the Legislature. The objection goes, not to the power of the Legislature to subject the defendant to the jurisdiction of the courts, but, in the absence of an express provision to that effect, the consideration is supposed to militate against the reasonableness of the view that the power of the defendant to be sued is implied. It is not at this time necessary to decide in what manner a judgment could or should be enforced against the defendant, or whether the court could or would, for the purpose of executing its judgment, cause the property of the defendant to be seized and sold."
>
> *Phoenix Lumber Co. v. Regents of University of Idaho*, 197 Fed. 425 at 428-29.

The matter of collecting a judgment in a suit against a state agency was also considered, in a measure, in the case of *Ward v. Board of Regents,* 138 Fed. 372, in which the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Amidon, considering a similar argument as now urged, says:

> "And in case no funds exist for the purpose, it will be presumed that the Legislature will discharge its duty by providing a fund to meet any liability of the board which is thus judicially established."

The point was also considered by the Supreme Court of the United States in *Hopkins v. Clemson State Agricultural College,* 221 U. S. at 648, where the court says:

> "Besides, we have no right to proceed on the theory that if, at the time of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in pleas to the jurisdiction, afford no reason why the college should be granted immunity from suit."

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1928

No. 96

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of Respondent

JOHN W. LACEY,
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(33,304)

LEGAL PRINTING CO., SALT LAKE CITY

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12. In so far as the state's interests are affected by this action, and in so far as it is represented by the Commission, the state waived its immunity by the Commission's voluntary appearance in the action and contesting the same on the merits. The state legislature could not revoke jurisdiction in the Federal Court after having thus submitted to it 8

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In the Supreme Court of the United States

October Term, 1928

No. 33,304

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of Respondent

STATEMENT OF THE CASE

History of the Litigation.

Utah Construction Company, a corporation of the State of Utah, (sometimes referred to hereafter as "plaintiff"), commenced this action in the United States District Court for the District of Wyoming against the State Highway Commission of Wyoming, (referred to hereafter as "the Commission") for damages arising out of the breach of a construction contract made June 1st, 1922, under which

the plaintiff had undertaken to build and had thereafter built a portion of the so-called Wind River or Big Horn Canyon Highway in Wyoming (Tr. 1-78).

Jurisdiction of the court was invoked on the ground of diverse citizenship of the parties under Sec. 24 of the Judicial Code (U. S. Code, Sec. 41, Subd. 1, (See Appendix p. 59) it being alleged that the plaintiff is a citizen of Utah and the Commission and its individual members are citizens of Wyoming and the jurisditional amount was present (Tr. 3). A demurrer to plaintiffs second amended petition was filed by the Commission on August 26, 1925, first challenging the jurisdiction of the court on the ground that the State of Wyoming was the real party defendant, and second demurring generally as to the cause of action. (Tr. 78). This demurrer was overruled on October 16, 1925 (Tr. 79); the opinion of the District Court made in support of the order overruling the demurrer is found on page 104 and following of the transcript of record.

The Commission on November 14, 1925, filed its answer to the second amended petition (Tr. 79-93), to which plaintiff on January 14, 1926, made its reply (Tr. 93-99). On November 6, 1926, the Commission demurred to the reply, again challenging the jurisdiction of the court on the ground that the State was the party defendant and also demurring generally to the reply and re-asserting its demurrer to the second amended petition (Tr. 10).

The District Court, after a re-argument of the question of jurisdiction presented by this latter demurrer, changed its ruling, and on December 4, 1926, made its order sustaining the demurrers and entered its judgment dismissing the case (Tr. 100), holding that the State was in effect the party defendant and, since the state itself was not a citizen within the meaning of Section 24 of the Judicial Code the requisite diversity of citizenship did not appear.

The opinion of the District Court sustaining the demurrer is found on pages 115 to 124 of the transcript of record and is reported in 16 Fed. (2d) 322. For review of the judgment of dismissal thus entered the plaintiff, by writ of error brought the case to the Circuit Court of Appeals for the Eighth Circuit, which court, under date of December 21, 1927, reversed the District Court's ruling with directions that the judgment dismissing the case be set aside (Tr. 141-142). The opinion of the Circuit Court of Appeals is contained in the transcript of record at pages 126-137, with a dissenting opinion of Judge Scott found at pages 137-141 thereof. The opinion of the Circuit Court of Appeals is reported in 23 Fed. (2d.) page 638.

The case comes before this court on writ of certiorari (Tr. 142).

Ground of Jurisdiction.

As noted, jurisdiction was invoked by plaintiff on the ground of diverse citizenship of the parties under Section 24 of the Judicial Code, there being the jurisdictional amount involved. The State Highway Commission of Wyoming, it was contended, is a juristic entity, created by Chap. 132 of the Laws of Wyoming of 1919; Wyoming Compiled Stat. 1920, Chap. 186 (See Appendix p. 57) It has attributes and functions which for the purpose of suit distinguish it from the State of Wyoming. It is a citizen within the intent of Sec. 24 of the Judicial Code and appears on the record as, and is in fact, the real party defendant.

SUMMARY OF THE ARGUMENT.

The cases cited on the points enumerated in the succeeding summary are believed to uphold the view above expressed and to sustain the jurisdiction of the District Court.

1. The Commission is a quasi corporate body.

Butterfield v. State Industrial Accident Commission 111 *Ore.* 149, 223 *Pac.* 941;

Bromwell B. & W. G. Co., v. State Board of Charities and Corrections, 279 *Fed.* 440;

Larned v. Briscoe et al, 62 *Mich,* 393, 29 *N. W.* 22;

State v. Board of Health, 23 *Atl.* 949 (*N. J.* 1892);

Dunn v. University of Oregon, 9 *Ore.* 357;

Hancock v. Louisville & N. R. Co., 145 *U. S.* 409, 36 *L. Ed.* 755;

Levy Court v. Woodward, 2 *Wall.* 501; 17 *L. Ed.* 851;

Gross v. Kentucky Board of Managers, 105 *Ky.* 840;

14 *Corpus Juris, p.* 76.

2. Quasi corporate bodies, even though but local arms or agencies of the state government as in the case of Counties, (*Board of Comrs. of Laramie Co. v. Board of Commissioners of Albany and Carbon Counties,* 92 *U. S.* 307), are universally recognized as having an individuality separate from that of the state and a citizenship within the intent of Section 24 of the Judicial Code.

Lincoln County v. Luning, 133 *U. S.* 529;

Chicot County v. Sherwood, 148 *U. S.* 529.

3. If not a quasi corporate body, the State Highway Commission of Wyoming is still a legal entity; it is a collective body of individuals and derives a citizenship from the citizenship of its members.

Thomas v. Ohio State University, 195 *U. S.* 207, 49 *L. Ed.* 160.

4. The contract for the breach of which this action was commenced is not, as contended, a contract which *by its terms* is a contract between the plaintiff and the state. Authority is given to the commission by the statute creating it to make contracts in its own name both for state construction and county construction; it has no authority

to contract in any other name (Wyoming Comp. Stat. 1920, Chap. 186). It will be presumed to have contracted in an authorized manner.

Sloan Shipyard Co. v. U. S. Shipping Bd. and E. F. Corp. 215 *U. S.* 549 *at* 563.

The recital that it acts in a representative capacity will not operate to bind any other than itself.

State of Ohio v. Swift and Co. 270 *Fed.* 141.

The contract moreover has abundant internal evidence that the Commission, in its own name, was the contracting party, and a supplemental agreement between the plaintiff and the Commission, thereafter made, recites that the main contract was made between the plaintiff and the Commission (Tr. 75-77).

5. Whether the state is the real party defendant to this action should not be controlled, as assumed in petitioner's brief, by the rule laid down for ascertaining the application of the Eleventh Amendment to the Federal Constitution. In so far as the State's interests are effected by this litigation, it has waived its immunity by consenting that the suit may be brought, i. e., that the Commission may sue and be sued. The Eleventh Amendment was enacted in response to the public clamor over the decision of the Supreme Court in Chisolm v. Georgia. *Hans v. Louisiana,* 134 *U. S.* 1 *at* 10-17. The Amendment has therefore been given a liberal construction with the view of protecting the State's immunity from suit.

Regan v. Farmers Loan and Trust Company, 154 *U. S.* 362.

But Section 24 of the Judicial Code has been given a broad and liberal construction with a view of upholding the court's jurisdiction. Those acting in a representative

capacity, when authorized to sue or be sued, stand upon their own citizenship irrespective of the citizenship of the persons they represent, whose rights or property are involved.

Mexican Central R. Co. v. Eckman, 187 *U. S.* 427.

The citizenship of the parties to the record govern.

Childress v. Emory, 8 *Wheat.* 642, 669;
Rice v. Houston, 13 *Wall.* 66;
Blake v. McKim, 103 *U. S.* 336;
Smith v. Radkliffe, 87 *Fed.* 964;
Coal and Iron Co. v. Rehard, 204 *Fed.* 859;
Brisden v. Chamberlain, 53 *Fed.* 307;
Susquehanna & W. Va. Ry. and Coal Co. v. Blachford, 11 *Wall*, 172;

6. The fact that the Commission is a mere agency, or arm, of the State formed to perform a business, or a governmental, function, does not prevent its suing or being sued in its own right and name, if it is a legal entity.

Hopkins v. Clempson Agricultural College of South Carolina, 221 *U. S.* 636;
Port of Seattle v. O. W. R. R. Co., 255 *U. S.* 56;
Pearl River County v. Wyatt Lumber Co., 270 *Fed.* 26;
Parks v. Carriere Cons. School Dist., 12 *Fed.* (2d) 37;
Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corporation, 258 *U. S.* 549;
Board of Levee Comrs. v. Hulse, 17 *Fed.* (2d) 785;
Carmichael v. Anderson, 14 *Fed.* (2d) 166;
Butterfield v. State Commission, 111 *Ore.* 149;
Thompkins v. Kanawha Board, 19 *W. Va.* 264;
Gross v. Kentucky Board of Managers, 105 *Ky.* 840;
Bromwell Co. v. State Board, 279 *Fed.* 440;
Kelley v. Board of Public Works, 25 *Gratt* (*Va.*) 755;

County Board of Education v. State Board of Education, 106 *N. C.* 81;

Board of Trustees of Un. of Ill., v. Bruner, 51 *N. E.* 687 (*Ill.* 1898);

Reliance Mfg. Co., v. Board of Prison Comr's., 170 *S. W.* 941 (*Ky.* 1914);

Dunn v. University of Oregon, 9 *Ore.* 357.

7. That the Commission has no funds or property out of which a judgment rendered against it may be satisfied, if such be the fact, does not render the Commission any the less a party to the action, which it must defend in its own right where suit against it in its own name is expressly authorized. If there are no funds or property of the Commission which can be reached it will be presumed that the legislature which authorized it to be sued, will eventually supply it with funds to satisfy any judgments rendered against it.

Ward v. Board of Regents, 138 *Fed.* 372;

Hopkins v. Clempson Agriculture College, 221 *U. S.* 636;

Phoenix Lumber Co. v. Regents of the University of Idaho, 197 *Fed.* 425.

8. But the Commission has, or may have, property out of which the judgment may be defrayed. Also, the so-called State Highway fund is not strictly a state fund. It is subject to the disposal of the Commission and is set apart for it. It is derived partly from County sources and is a financial asset of the Commission alone.

Butterfield v. State Commission, 11 *Ore.* 149;

Port of Seattle v. O. W. R. R. Co., 255 *U. S.* 56;

Pearl River County v. Wyatt Lumber Co. 270 *Fed.* 26.

9. Decisions of the Supreme Court of Wyoming construing a state statute are not binding on the Federal

Courts where the contract or rights sought to be effected thereby originated prior to such state decisions.

Burgess v. Seligman, 107 *U. S.* 123, 133;
Kuhn v. Fairmont Coal Co., 215 *U. S.* 349, 360;
25 *Corpus Juris, p.* 843.

10. On matters involving its jurisdiction a federal court is not bound by decisions of a state court, but will exercise its independent judgment.

Mechanical Appliance Co. v. Castleman, 215 *U. S.* 437;
Southern Photo. Material Co. v. Eastman Kodak Co., 224 *Fed.* 523;
Thomas v. Trustees of Ohio State University, 195 *U. S.* 207.

11. Having established the Commission as a body in its nature suable the legislature of Wyoming could not, by its amendment to section 3025 of the statute, restrict jurisdiction to its own courts and thus abridge the jurisdiction of the federal courts.

Chicot County v. Sherwood, 148 *U. S.* 529;
Barrow v. Kane, 169 *U. S.* 517.

12. In so far as the state's interests are effected by the action and in so far as it is represented by the Commission, the State waived its immunity by the Commission's voluntary appearance in the action, by filing its general demurrer and its answer on the merits.

Clark v. Barnard, 108 *U. S.* 436.

Having tthus submitted to the jurisdiction the State could not revoke jurisdiction in the Federal Court, over which it has no control, by changing the statute. State decisions with respect to jurisdiction in state courts have no application, since the revocation of consent served also to revoke jurisdiction in the state court.

13. Federal cases cited in petitioner's brief holding that the state is a party to the action are cases in which the Eleventh Amendment was invoked and in which the direct object of the suit was to deprive the state of its property, effect its property interests, or compel the performance of some political function by a state officer. These cases have no application to an action, like the present, in which the object is merely to secure a judgment against a suable body, and no attempt is made to charge the state with liability or to effect its interest except as the state may be ultimately interested in an action brought against one of its creatures created by it for the performance of a business or governmental purpose.

14. Decisions of state courts cited in petitioner's brief holding that the suits reviewed are against the state are in the main expressions of the attitude of state courts in over-zealously emphasizing the state's sovereignity and exemption from suits in its own courts.

15. The Wyoming Constitutional Amendment did not create the Commission; it does not affect its purpose or control its nature.

ARGUMENT.

The decisions of the jurisdictional question involved require at the outset an examination of Chap. 186 of the Wyoming Compiled Statutes of 1920; Chapter 132 of the Laws of Wyoming of 1919. This statute is set out in the appendix at pages 57-64, and is summarized in the opinion of the Circuit Court of Appeals at pages 126-129 of the transcript of record. Reading this statute from beginning to end we note that whereas it purports to create a "State Highway Department" the State Highway Commission created thereby is endowed with certain peculiar attributes which distinguish it from a real department of

state. It is apparently an organization, created for the construction of state and county highways, the planning of highways for towns and municipal bodies, and the entering into contracts with individuals for such part of highway construction as it does not construct directly. In the performance of its business it proceeds, not in the name of the state but in its own name and on its own authority, and the interest which it represents is not alone the interest of the state but the interest of the counties whose highways may be constructed in part by it, and it roughly represents certain territorially defined highway districts. The statute provides:

"The Commission shall have the power to sue in the name of the State Highway Commission of Wyoming and may be sued by such name in any court upon any contract executed by it." (Sec. 3025). "All road and bridge construction work *any part of the cost of which is paid from the State Highway fund,* shall be performed according to plans prepared by the State Highway Superintendent and approved by the Commission and shall be performed by or under contracts awarded by the Commission." (Sec. 3027).

Contracts for construction costing more than Two Thousand Dollars shall be *awarded* to the lowest responsible bidder, but "Improvements costing less than Two Thousand Dollars may be constructed by the Commission on force account" (Sec. 3027). The Commission shall have the power to designate public highways as state highways and incorporate county roads into state highways (Sec. 3028). State highways shall be constructed at the expense of the state (Sec. 3029), but the Commission may co-operate with the respective counties of the state in the construction of county roads and bridges and such co-operative work shall be performed under the control and supervision of the Commission and in accordance with plans prepared by

the State Superintendent and shall not be commenced until the county "shall have entered into an agreement with the Commission to pay not less than one-half of the total cost to the state of such work and to pay the entire cost of maintaining the said highway thereafter." (Sec. 3030). This latter provision clearly gives the Commission authority to construct county roads to be owned and maintained by the county; this is the performance of a county as distinguished from a strictly state work.

The Commission is authorized to enter into agreement with the United States relating to the construction and maintenance of roads under the so-called Federal Aid Act. Such co-operative agreements may be for the construction or improvement of either a state highway or a county road. If the highway so to be constructed or improved is a county highway "the state's shares of the cost of such work shall be divided between the state and the county upon such basis as the Commission shall determine" and the county must furnish the right of way and enter into an agreement with the Commission whereby it shall agree to pay its share of such cost and to pay the cost of all subsequent maintenance work which shall be performed by and under the supervision of the State Highway Superintendent, and the county also shall pay into the State Highway fund its share of the estimated cost of such construction. (Sec. 3031).

In securing the necessary rights of way for such portions of highways as shall be designated as state highways the Commission may acquire the same by purchase or gift, or if necessary may acquire the same "by condemnation proceedings in the same manner as is provided by law for the condemnation of rights of way for railroad purposes" (Sec. 3028). In-as-much as it is maintained that the Commission is the *alter ego* of the state this latter provision is quite significient, for at the time of the enactment of the

statute creating the Commission the State by statute was already vested with the right to condemn rights of way in the same manner provided by law for the condemnation of rights of way for railroad purposes; *Section* 4893 *of the Wyoming Compiled Statutes* 1920 provided that "the state, the counties and each municipal corporation shall have power to purchase or acquire, by condemnation, any real estate, including streets, alleys or public highways * * * which power of condemnation shall be exercised in the manner prescribed by law for the condemnation of real estate by railroad companies" (see appendix p. 66). If the Commission be in fact the State, acting directly in the state's right, why should the legislature, having provided for the exercise of the right of eminent domain by the state in a particular manner, expressly grant the Commission the power to exercise this right in the same manner.

The manner in which the Commission is constituted is in itself significant. Its members are appointed as representatives of certain districts, each district comprising a separate territorial area (Sec. 3025). That these districts are in fact roughly defined highway districts is seen by a subsequent provision that seventy-five per cent of the amount appropriated to the State Highway fund "after the payment of overhead expenses, shall be apportioned to and spent in each Commissioner's district in proportion to the assessed valuation of each district by the last general assessment." (Sec. 3035).

"The Commission shall have a seal bearing the words 'State Highway Commission of Wyoming official seal' and copies of records in the office of the Commission certified by the Secretary of the Commission of such seal shall have prima facie varity." (Sec. 3025).

The Attorney General shall be the legal advisor of the Commission "and shall prosecute and defend all actions and appear in all proceedings in any federal department

in which the Commission shall be a party or be interested" (Sec. 3025). At the time of the enactment of this statute the laws of Wyoming already provided that "the Attorney General shall prosecute and defend all suits which may be instituted by or against the State of Wyoming, the prosecution and defense of which is not otherwise provided for by law * * * he shall be required to attend the interests of the state in all suits, actions or claims in which the state is or may become interested in either the Supreme Court of the state, or in any of the United States courts. He shall be the legal advisor of all elective and appointive state officials" (Wyoming Compiled Stat. 1920, Sec. 154. See Appendix p. 68).

For the uses of the Commission there is created a fund known as the state highway fund. It shall be in charge of the state treasurer and is composed of moneys appropriated by the legislature and moneys received from the United States under co-operative agreements, moneys derived from taxes for such fund or received from the sale of state bonds for highway construction or improvement, *moneys received from counties under co-operative agreements* and all other moneys received from donations or bequests which may be accepted by the Commission on behalf of the State of Wyoming, or from any other source designated by law for that purpose. The money in said fund shall be available to the Commission without further appropriation and no warrant shall be drawn thereon except on vouchers approved by the State Highway Superintendent. (Sec. 3034). Balances remaining in said fund at the close of any annual or biennial period shall not revert to the general fund, but shall remain in the state highway fund and be subject to subsequent expenditure under this chapter (Sec. 3035).

The combined force of these provisions indicates the creation of a body for the purpose of performing a business function in the interest of state, counties and munici-

palities and having power to contract in the interest of states and counties. While the statute does not expressly state that its contracts must be made in its own name, this is the obvious implication; it has the power to *award* "contracts; it has the power to construct roads on 'force account'"; it may contract for the building of highways, parts of which are owned and maintained by the counties. The body thus created is roughly representative of designated highway districts. It can sue and be sued in its own name. It has a seal, as distinguished from the seal of the state in the charge of the Secretary of State. It can condemn rights of way. It is a perpetual body. It operates as a unit and through the collective action of its members. It is given various powers which the state, acting in its own interests, already possessed.

1. The State Highway Commission of Wyoming, thus created, is a quasi corporate body. When designated as a branch of a "department of the state" it is misnamed. Its combined powers and the obvious purpose of its creation is consistent only with the formation of a legal entity, or juristic creature, with quasi corporate powers and functions.

In support of this proposition we cite the authorities set out in sub-division One of the Summary, calling attention to the following cases as illustrative of the point:

In Butterfield v. State Industrial Accident Commission, 223 *Pac.* 941, the Supreme Court of Oregon, considering the nature of a similar commission and its relation to the state, uses the following language:

> "It is the contention of the attorney general that the State Industrial Accident Commission is an arm of the state, administering the act commonly known as the Workmen's Compensation Act (Or. L., Secs.

6605-6659), and that the state is therefore the real party in interest. From these premises he argues, because the state cannot be sued, the Industrial Accident Commission cannot be. The Legislature has provided that the Industrial Accident Commission 'in its name may sue and be sued, and shall have a seal which shall bear the name of the Commission.' Section 6611, Or. L. The Commission is given other powers exercised by a corporation. Section 6629, Or. L., as amended by Laws 1921, c. 311. It is a creature of the Legislature, and is a body corporate.

"This court has held the act creating the Commission to be constitutional. Evanhoff v. Industrial Accident Commission, 78 Or. 503, 154 Pac. 106. The primary duty of the Commission is to administer the act. Section 6611, Or. L. The exercise of judicial functions is incidental to its primary duty, and the act is not unconstitutional on that account. *In re* Willow Creek, 74 Or. 592, 144 Pac. 505, 146 Pac. 475. Nor does the fact that payments from the fund created by the act are to be made by the state treasurer on warrants drawn by the secretary of state render it unconstitutional. Both the secretary of state and the state treasurer are without discretion in regard to that fund. Payments from the fund can be made only upon vouchers transmitted by the Commission. Section 6638, Or. L., as amended by Laws 1921, c. 311. The state is a contributor to the fund, and is, therefore, interested in the fund in the same manner as it is in the fund of the State Board of Agriculture. Tongue v. State Board of Agriculture, 55 Or. 61, 105 Pac. 250." (223 Pac. at 942.)

In People v. Harper, 91 *Ill.* 357, a suit was brought by the state to enforce a surety bond given by one William Harper, as chief grain inspector. It was alleged that Harper, under the rules of the Railroad & Warehouse Commission of Illinois, had collected certain fees, and had thereafter appropriated the same. A demurrer was sustained by the lower court on the ground that the statute

under which the Board of Warehouse Commissioners was created was invalid insofar as it authorized the board to establish rules for the inspection of grain and the imposition of fees and charges therefor. In reversing the case the Supreme Court of Illinois held:

> "That the board thus created is a quasi public corporation, admits of no controversy. Angell & Ames on Corporations, Secs. 23, 24; Dillon on Municipal Corportions, Sec. 9. And it is now too late to question the power to create such agencies in the administration of the government, and invest them with such legislative power as shall be appropriate and necessary to effectuate the objects of their creation. Cities, towns, villages, counties, townships, road districts and school districts are familiar instances of local, corporate and quasi corporate agencies in the administration of the government, invested with powers to some extent of a legislative character. Besides these, and of a different character of public agencies, are boards for the control of the public charitable, penal and reformatory institutions, and that for the construction, management and operation of the Illinois and Michigan canal,—all of which have been and are invested with power and authority to make contracts, fix prices, and adopt such rules, regulations and by-laws as shall be reasonably adapted to and necessary to carry out the purposes of their creation. And the last named board, since the act in relation to the construction, etc., of the canal, approved January 9, 1836, has been invested with and exercised the power of making rules, regulations and by-laws for fixing tolls to be paid for transportation, for governing persons employed about the canal, for injuries done to the canal, locks and tow-paths, and for the management and navigation of the canal." (91 Ill., P. 366.)

In *Bromwell B. & W. G. Co. v. State Board of Charities and Corrections,* 279 *Fed.* 440, the District Court of Kentucky had before it the question as to whether a suit

against the state board was in fact a suit against the state of Kentucky in coming within the inhibition of the Eleventh Amendment of the Constitution of the United States, and in deciding this matter, said:

> "By section 2 of the latter act is is provided that the defendant is 'vested with authority to and shall, except as hereinafter provided, exercise * * * the privileges and discharge all the duties now vested by law in the State Board of Control,' and that the State Board of Control is 'hereby abolished and the terms of office, of the present members of same are hereby terminated.' In neither act is it provided in so many words that the board thereby created is to be a corporation. Notwithstanding such is the case, the former board was, and the defendant board is, a corporation, or at least a quasi corporation, whatever that may mean. Direct authority for this position is to be found in the decision of the Kentucky Court of Appeals in the case of Gross v. Kentucky Board of Managers, 105 Ky. 842, 49 S. W. 458, 43 L. R. A. 703. It was there held that the Kentucky Board of Managers of the World's Columbia Exposition, created by an act of the Legislature of this state, was such an entity, though it was not expressly so provided therein. Judge Hobson said:
>
> " 'So the question is presented whether appellee was invested by the Legislature with the character of a corporation or quasi corporation. It is not necessary that the thing created by the Legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by which the Legislature may call it.'
>
> "In support of the decision, that of the Supreme Court of the United States in the case of Hancock v. Louisville & Nashville R. R. Co., 145 U. S. 415, 12 Sup. Ct. 969, 36 L. Ed. 755, was cited. In the opinion therein it is said:
>
> " 'That this entity was not in terms named a corporation is not decisive. It is enough that an

> artificial entity was created, with power to exercise the functions of a corporation. It was, though not named, a corporate entity.' " (279 Fed. 441-442.)

In Dunn v. The University of Oregon, 9 *Ore.* 357, suit was brought against the board of regents of the State University, and it was contended that the board of regents of the university, not being a corporation, could not be sued, and that the real party defendant was the state of Oregon (see p. 359). In deciding this matter the court said:

> "It is true the Legislature has not declared it to be a corporation in express terms, but this was not essential. (Angell and Ames on Corporations, section 76; Thomas v. Dakin, 22 Wend. 70, 103, 106.)
>
> " 'It is, indeed, a principle of law which has been often acted on, that where rights, privileges and powers are granted by law to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed, or such powers exercised, without acting in a corporate capacity, such associations are, by implication, a corporation, so far as to enable them to exercise the rights and powers granted.' (Angell and Ames on Corporations, Sec. 78.)" (9 Ore., p. 361.)

In Hancock v. Louisville & N. R. Co., 145 *U. S.* 409, 36 *L. Ed.* 755, the court considered and passed upon the validity of a lease made by the Shelby Railroad Company, in connection with which it became necessary to decide whether the Shelby Railroad District, a district created by the Legislature of Kentucky for the purpose of subscribing to stock of such railroad company, was a corporation, the act creating it not expressly providing that it was creating a corporation. The court said:

> "By the Act of 1869, this prescribed portion of Shelby county was authorized to issue bonds and subscribe stock. The bonds when issued were not

the obligations of Shelby county, nor of the individual taxpayers; and still there must be some debtor. That debtor was this portion of Shelby county. Giving to it power to issue bonds and create indebtedness, is the creation of an entity with power to act, and if this entity has power to create a debt it becomes subject to suit. That this entity was not in terms named a corporation is not decisive. It is enough that an artificial entity was created, with power to exercise the functions of a corporation. It was, though not named, a corporate entity, and the Acts of 1870 and 1873, as well said by the Court of Appeals, simply designate who should act for this corporate entity and give it a name."

2. If the Commission be a quasi corporate body, even though it be at the same time a local arm of the state, or an agency of the state government it must be recognized as having an individuality separate from that of the state and as possessing a citizenship within the intent of Section 24 of Judicial Code.

The most commonly recognized exemplification of quasi corporations are counties. Counties "are the mere creatures of the legislative will * * * they are but subdivisions of the state, deriving even their existence from the legislature. Their officers are nothing more than local agents of the state; and their powers may be revoked or enlarged until their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated." *Board of Commissioners of Laramie County v. Board of Comr's. of Alpine and Carbon Counties,* 92 *U. S.* 307. But it has never been questioned that a county, by reason of its quasi corporate nature is a citizen within the purview of Section 24 of the Judicial Code, and that it has a separate individuality

from that of the state, even when immunity from suit is claimed under the Eleventh Amendment.

Lincoln County v. Luning, 133 *U. S.* 529;
Chicot County v. Sherwood, 148 *U. S.* 529.

3. If not a quasi corporate body, the State Highway Commission of Wyoming is still a legal entity and a juristic being; it is a collective body of individuals and is a citizen of the state by virtue of the citizenship of its members.

Thomas v. Ohio State University, 195 *U. S.* 207.

In the Thomas case suit was brought by a citizen of Michigan against the Board of Trustees of the Ohio State University to effect a partition of certain lands alleged to be held adversely by the defendant board of trustees. Although legal title was in the Board it is apparent that, the land being for the use of a state institution, the equitable title was in the state. The case came before the Supreme Court upon certified questions relating to the jurisdiction of the Circuit Court. The Supreme Court held that the Board of Trustees of the University did not constitute a corporation of the State of Ohio. It held this out of deference to a like holding of the Supreme Court of Ohio, although recognizing that on a jurisdictional question the holding of the Ohio Court was not binding on the Federal Court. But the Supreme Court further held that although not a corporate body, the Board of Trustees might be sued by their collective name providing there was an averment (as in the present action) that each individual member of the Board was a citizen of Ohio:

> "While the state court may not conclusively determine for this court what is and what is not a corporation within the meaning of the jurisdictional rule that a corporation, for purposes of suing and being sued in the courts of the United States, is,

under the Constitution and laws of the United States, to be deemed a citizen of the state by whose laws it is created, nevertheless, this court should accept the judgment of the highest court of a state upon the question whether a particular body created by its laws is or is not a corporation, by virtue of those laws, unless a contrary view is demanded by most cogent reasons involving or affecting the constitutional and statutory jurisdiction of the federal courts. No such reasons exist in this case. (195 U. S. 216-217.) * * * To the second question our answer is that, as the board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the Circuit Court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the board before the court as defendants, provided the bill had contained the additional allegation that each individual trustee was a citizen of Ohio." (195 U. S. at 218).

4. The contract for the breach of which this action was commenced is not, as contended, a contract which *by its terms* is a contract between the plaintiff and the State. Authority is given to the Commission by the statute to make contracts in its own name both for state construction and county construction; it has no authority to contract in any other name, than its own. It will be presumed to have contracted in an authorized manner and not in an unauthorized manner.

Sloan Shipyard Co. v. U. S. Shipping Board & Emergency Fleet Corporation, 258 *U. S.* 549, 568.

The recital that it acts in a representative capacity will not operate to bind any others than itself.

State of Ohio v. Swift & Co., 270 *Fed.* 141.

The manner in which the contract was formed and the evidence contained in its provisions show that the Commission, in its own name, was a contracting party. A supplemental agreement between the plaintiff and the Commission, thereafter made, recites that the contract *was* made between the plaintiff and the Commission (Tr. 75-77).

The proposition above made is in reply to the argument contained under Sub-division IV, page 22 of petitioner's brief. It seems logical to consider this matter here, since if it be true that the contract was made by the State in its own name and not by the Commission, the plaintiff is obviously suing the wrong party.

It is true that the formal contract recites that it is an agreement "between the State of Wyoming acting through the State Highway Commission and the Utah Construction Company." (Tr. 71), and that the testimonium clause has the same recital, (Tr. 74). The contract is signed however "State Highway Commission of Wyoming, by L. E. Laird, Superintendent, Z. E. Sevison, Secretary," in an individual and not an agency capacity (Tr. 75). The form of recitals in the contract is undoubtedly confusing. The contract also provided for the payment of sums by the state. This is confusing only in appearance, inasmuch as one person may legally contract for the payment of a sum by another person. After the contract was made the supplemental agreement of the parties straightens out this confusion by referring to the previous contract as having been a contract "between the State Highway Commission of Wyoming and the Utah Construction Company" (Tr. 75). This supplemental contract is signed "State Highway Commission of Wyoming" in an individual and not in a representative capacity (Tr. 77). Nowhere is the name

of the State of Wyoming signed, or its seal attached, signed to the contract.

To say that the contract is a contract which by its terms makes the state a party is to ignore the authority under which the Commission was acting and the power given to it by the statute. The statute creating the Commission (Sec. 3027) provides that "all road and bridge construction work any part of the cost of which is paid from the State Highway fund * * * shall be performed by or under contracts *awarded* by the Commission * * * . All improvements costing more than Two Thousand Dollars shall be constructed upon contracts *awarded* to the lowest responsible bidder after public notice, but the Commission may reject any or all bids * * * . The Commission shall adopt general rules regulating the publication of notice to bidders and the awarding of contracts." The word "awarded" in the connection used, undoubtedly has the sense of "executed." Clearly the intent is not to have the Commission contract in the name of the county in constructing the county highways, and in the name of the state in constructing state highways. At another point the statute provides for an agreement entered into between the county and the Commission (Sec. 3030). At another place the Commission is "authorized to enter into all contracts and agreements with the United States" (Sec. 3031). The Commission is recognized throughout as the contracting party.

Although there is a formal contract (Tr. 71-75), the actual contract is in fact a proposal by the Utah Construction Company "to the State Highway Commission of Wyoming" and an acceptance of the provisions of said proposal. Thus the formal contract provides: "It is also understood and agreed that the advertisement, proposal, bond, specifications and plans, as hereto attached or herein referred to, are all essential documents to this contract and are a part thereof." (Tr. 74). The plans and specifi-

cations, which were submitted to the contractor in advance of his offer, or bid, define the contract entered into by the parties as follows:

> "6. Contract. The agreement between the contractor and the State Highway Commission covering the work to be performed and including the plans and specifications" (Tr. 14).

The specifications provide for the manner of proposals of those desiring to enter into an engagement to construct (Tr. 16). They further provide that "the award of the contract, if it is awarded, will be to the lowest bidder whose proposal shall comply with all requirements necessary to render it formal." (Tr. 17). It is further provided "that all awards will be made with the understanding that the work awarded will be performed by the contractor to whom the award is made * * * and the *contract* shall not be sublet to another contractor except with the written consent of the State Highway Engineer' (Tr. 18).

It is further provided that "the State Highway Commission whenever any of the following conditions exist, may enter upon the performance of the terms of the contract of which these specifications form a part" (Tr. 26). If the said conditions exist the State Highway Engineer will notify the contractor and if the conditions are not complied with and if no effort is made by the contractor or his surety to correct the condition, "the Commission may enter for the purpose of performing the terms of said contract" (Tr. 26). When this is done "the Commission, without violating the contract, may then proceed with the work in any lawful manner it may elect until the work is formally completed and the terms and conditions of the contract are completely performed" (Tr. 27). If the total cost of completing the work "is greater than the contract price, the excess shall be made up and paid to the State

Highway Commission by either the contractor or his sureties. * * * Upon the State Highway Commission entering upon the completion of said contract, it may, if it so elect, pay for such material and labor which has entered into such construction prior to the taking over of the same by the State Highway Commission hereunder, which has not been paid for by the contractor or anyone in his behalf" (Tr. 27). The proposals of the contractor referred to in the formal contract are set out on pages 65 to 69 of the transcript. These proposals are "to the State Highway Commission of Wyoming" (Tr. 65, 67, 69). They recite that "accompanying the proposal is a certified check for $.....payable to the State Highway Commission of Wyoming" (Tr. 66, 68, 70).

The real contract between the parties is all the proposal or offer, on the part of the plaintiff and the acceptance of such offer by the party to whom it was made —that is, by the Commission. The Commission had no authority under the statute to contract in any other way; it was required to *award* the contract in such manner. If in executing the formal contract it recited that it was acting in a representative capacity, it was stating what was obviously untrue. It had no power to act in a representative capacity under the circumstances and to attempt to do so only served to bind itself and not its purported principal.

State of Ohio v. Swift & Co., 270 *Fed.* 141 is applicable to the above statement. It was there held that the unauthorized act of a prosecuting attorney brought in the name of the State was in fact the act of the prosecuting attorney and not the act of the State.

The Commission was moreover the real contracting party to the transaction. The specifications which it gave to the contractor and embraced in its contract recited that it was a contracting party. It will be presumed to have acted according to its purported object.

Sloan Shipyard Corp. v. U. S. S. Bd., E. F. Corp., above cited, contains a holding which is applicable to this point. In the Sloan Shipyard case suit was brought against the U. S. Shipping Board and Emergency Fleet Corp. by various parties who had contracted to build for the Fleet Corporation certain wooden vessels. It was contended that the suit was in reality a suit against the United States and was apparently contended that one contract, constituting a part of the subject matter of the suit, showed upon its face that it was not made with the Fleet Corporation inasmuch as it recited that it was made with the Fleet Corporation representing the United States of America. To this contention this Court, through Mr. Justice Holmes said:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation, 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect." (258 U. S. 568).

5. Whether the State is the real party defendant to this action should not be controlled, as assumed in petitioner's brief, by the rule laid down for ascertaining the application of the Eleventh Amendment to the federal constitution, for, in so far as the State's interests are affected by this litigation, it has waived its immunity by consenting that the action may be brought—that is, by providing that the Commission may sue and be sued.

The Eleventh Amendment was enacted in response to the public clamor over the decision of the Supreme Court in Chisolm v. Georgia. *Hans v. Louisiana* 134 *U. S. at* 10-17. The amendment has therefore been given a liberal construction with a view of protecting the State's immunity from suit. *Regan v. Farmers Loan & Trust Co.*, 154-362.

But Section 24 of the Judicial Code has been given a broad and liberal construction with a view of upholding the court's jurisdiction. Those acting in a representative capactiy, when authorized to sue or be sued, for the purpose of federal jurisdiction stand upon their own citizenship irrespective of the citizenship of the persons they represent and whose rights or property are involved. *Mexican Central R. Co. v. Eckman,* 187 *U. S.* 427 and cases cited under paragraph 5 of the Summary of Argument.

The above point is made in view of the fact that most of the cases cited in petitioner's brief to the point that the State in the present action is a real party defendant, notably those on pages 24 and 25, are cases in which the Eleventh Amendment was invoked and the rule underlying its application was discussed. But the question here is not whether the suit is forbidden by the Eleventh Amendment, for it is not. If the Commission be in fact the State contracting under an *alter ego,* as contended, the State has consented to the suit and waived its immunity. But the Commission in the instant case takes the position not that the State cannot be sued, but that it cannot be sued in the Federal Court because it is not a citizen and unless there be diversity of citizenship in the parties, no independent ground of jurisdiction exists. In deciding then whether the suit is in fact a suit against the State, we are not concerned with whether the State's interests are affected, providing, under the general rules of pleading, the state is not an indespensable party to the action. The rule peculiar to the application of the Eleventh Amendment, we submit, is really of no importance.

The difference in the two rules is seen in the following quotations, the one from Regan v. Farmers Loan & Trust

Co. (supra) and the other from Mexican Central R. Co. v. Eckman (supra) above cited.

> "To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents and representatives, where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."
>
> "We have repeatedly held that representatives may stand upon their own citizenship in the Federal Court irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc."

6. The fact that the Commission is a mere agency, or arm of the State formed to perform a business or governmental function, does not prevent its suing or being sued in its own name and right, if it is a legal entity. In support of this point we cite cases hereinbefore cited under subdivision 6 of the Summary of Argument, a number of which we desire to review.

In discussing this point it must be borne in mind that the plaintiff has commenced this action merely for the purpose of securing a judgment. It has not sought to recover any property the title or possession of which is in the State; it is not suing to impress a lien upon any property belonging to the State; it is not seeking to compel a state officer to perform an act which will result in the turning over to the plaintiff of State money. The plaintiff has contracted with the Commission in reliance on a

statute which expressly authorizes the Commission to so contract and in which it expressly provides that having so contracted it may be sued. It believed and believes that by creating the Commission the State has so far separated itself from its agency, has so far divorced its own interests from the interests of the Commission, that this suit could be brought.

The State Highway Commission is undoubtedly an arm or agency of the State of Wyoming, but that fact in itself does not render it any the less liable upon its contracts, as is contended on pages 18 and following of respondent's brief. For, as seen, a county is a mere arm or agency of the State and is so far impressed with the State's sovereignty that it cannot be sued without authority of the Legislature. But, if authorized to be sued, as in the case of *Lincoln County v. Luning* 133 *U. S.* 529, it becomes a citizen within the intent of Section 24 of the Judicial Code.

We submit also that no objection to the present section can be made because the state has an ultimate interest in its outcome. The state has an ultimate interest in a suit brought against the county, a school district, a board of trustees of a state university. Judgments secured against these bodies must ultimately be paid out of state money or satisfied out of state property, inasmuch as the bodies sued are at the most merely trustees of the state's interest.

But though the State has an interest in the present action, the State Highway Commission of Wyoming has also an interest. Its interest has been given to it by the statute which authorized it to sue and be sued, which authorizes it to ocntract. It is interested in seeing that no judgment is secured against it which may eventually be satisfied from funds given to it by the State or out of property which the statute apparently authorized it to hold.

The matter of interest in the litigation will be discussed somewhat under a subsequent heading. In all of the cases cited under sub-division 6 of the Summary the defendant was an arm or agency of the State. The following cases are illustrative of the principle involved:

Sloan Shipyard Corp. v. U. S. Shipping Bd. E. F. Corp. 258 *U. S.* 549 was a suit by various contractors against the U. S. Emergency Fleet Corporation incorporated pursuant to congressional legislation by the U. S. Shipping Board. The Fleet Corporation was organized under the general laws of the District of Columbia in exercise, on the direction of the President, of a specified portion of the power and authority, in respect to ships, granted to him. (See *U. S. v. Strang* 254 *U. S.* 472, 493). The U. S. Shipping Board was the sole stockholder. It was contended that, inasmuch as the Fleet Corporation was a mere arm or agency of the government, no jurisdiction would lie, except in the Court of Claims. It had been held in the lower court (268 Fed. 624), in which the nature of the corporation is more fully explained, that the corporation was a mere agent, and that the suits were really against the U. S. government. Considering this proposition this Court, reversing the lower court, through Mr. Justice Holmes, said:

> "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff

his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts." (258 U. S. 566, 567).

Hopkins v. Clempson Agricultural College of So. Carolina, 221 *U. S.* 636, is a case cited in petitioner's brief. On analysis it appears to us to be direct authority for the points we here maintain, namely, that an action against an agency of the state, even though the state may have the ultimate interest in the action, is not an action against the state itself, and this is true even where the Eleventh Amendment is invoked and immunity granted thereby has not been waived. The Hopkins case was an action brought by a land owner against the trustees of the State Agricultural College of South Carolina for damages arising out of the construction of a dike on land occupied by the Board of Trustees and used by them in connection with the Agricultural College, which had resulted in the flooding of the land of the adjoining proprietor, the plaintiff in the action. Title to the land upon which the dyke had been erected by the Board of Trustees was in the State of South Carolina; its possession and use being in the Trustees of the College. It is to be noted, in reviewing the facts in this case, that in erecting the dyke in question the Trustees were acting entirely within the scope of their authority, although wrongfully. It was contended that the court had no jurisdiction inasmuch as the State was the real party against which the action was

brought. The language of the court itself best explains the jurisdictional question considered:

> "There was no demurrer, but the defendant filed what was treated as a plea to the jurisdiction in which it averred that it owned no property, and had constructed the dyke as a public agent only, by authority of the state, on land belonging to the state. By stipulation the hearing was confined solely to the question of jurisdiction, and after considering the evidence, the complaint was dismissed." (221 U. S. at 642).

The court after discussing the general rule under which state officers may be sued, when the Eleventh Amendment is invoked, says:

> "It is said, however, that in the cases referred to, the officers were held liable to suit because, in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the state. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the state itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty. In Lincoln County v. Luning, 133 U. S. 529, 33 L. Ed. 766, 10 Sup. Ct. Rep. 363, the court said that 'while the county is territorially a part of the state, yet politically it is also a corporation, created by and with such powers as are given to it by the state. In this respect it is a part of the state only in that remote sense in which any city, town or other municipal corporation may be said to be a part.' The court there held that the 11th Amendment was limited to those cases in which the state is the real party, or party on the record, but that counties were corporations which might be sued. Dunn v. University of Oregon, 9 Or. 357, 362; Herr v. Central

Kentucky Lunatic Asylum, 97 Ky. 463, 28 L. R. A. 394, 53 Am. St. Rep. 414, 30 S. W. 971." (221 *U. S.* 643.)

Continuing, the court states that the board of trustees claimed that the college never had an interest in the land described in the complaint or any other property connected with the establishment and maintenance of the college, all of it being the property of the state of South Carolina, "and it is argued that the court could take no jurisdiction of the case against the public corporation, which, at most, could only result in a judgment unenforceable by levy and sale under execution." To this the court replied:

> "As a matter of fact the record indicates that besides the annual appropriation of the state and the interest on securities held by the state, the college has other sources of income. It appears to hold some land in fee simple. The charter authorizes it to receive bequests. So that if the Fort Hill place is not subject to levy and sale, it does not follow that the institution may not now or hereafter own property out of which a judgment in plaintiff's favor could be satisfied. *Besides, we have no right to proceed on the theory that if, at the end of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in pleas to the jurisdiction, afford no reason why the college should be granted immunity from suit, when it is claimed that, in violation of the Constitution, it has taken private property for its corporate purposes without compensation.'* (221 U. S. at 648.) (Italics ours.)"

The opinion should be read in connection with the opinion of the Supreme Court of South Carolina which was reversed. (*Hopkins v. Clempson Agricultural College of So. Carolina*, 77 *S. C.* 12).

It is to be noted that the action in the Clempson case

was brought not against the Trustees as individuals, but as a board, and that the result of a judgment against them would have been to subject the property or money which came into their possession as a board to the satisfaction of the judgment; that any property or money so coming into their hands would be actually the property of the state entrusted to them for the performance of the state function which they, as a state agency, were performing; so that the *ultimate* interest in the action was in the state itself, notwithstanding the agency or arm of the state was sued.

It is to our mind of no significance that the action in the Clempson case was in tort and not upon a contract. If such a state agency can be sued, not individually but in its agency capacity in tort in just reason they may be sued *ex contractu*. The result in either case is the same, to secure a judgment which may be satisfied out of funds in its hands, if it has any such funds, and if not, out of funds which the legislature may appropriate to it for that purpose. Apparently jurisdiction of the Federal Court in the Hopkins case was invoked on the ground that there had been a depriving—in this case damaging—of property without due process of law. But the ground upon which jurisdiction was obtained is to our mind unimportant providing any ground exists. The remedy should be given whether jurisdiction was obtained on the ground of diverse citizenship to the same extent as if obtained under another provision of the Judicial Code.

Port of Seattle v. O. W. R. R. Co. 255 *U. S.* 56 was a suit brought by the Port of Seattle, a corporation created by the Legislature of the State of Washington for the purchasing and managing the State's tide lands. The statute creating the Port prescribed that it should be a municipal corporation, but it was apparently a municipal corpora-

tion only in the loosest sense. (See *Madden v. Lancaster County*, 65 *Fed.* 191.) In reality it answers to the definition of a quasi corporation. The object of the suit was to quiet the title of the *State of Washington* to said lands owned by the State as against an asserted claim of the defendant Railroad Company, an Oregon corporation. Jurisdiction was invoked on the ground of diversity of citizenship. The case came before the Supreme Court on direct appeal under Sec. 238 of the Judicial Code, as it then existed, to be decided on the jurisdictional question involved. In deciding the matter of jurisdiction the Court says at page 71,

> "Objection to the jurisdiction of the District Court is clearly unsound. The Port, being a municipal corporation under the laws of Washington, is a citizen of that state, and could have been sued in the Federal Court."

The Court further says,

> "It (the port) had both the power and the duty to bring suit to protect the interest here involved, and it had a direct financial interest in the result. For chapter 168 of the Laws of 1913 provides for a payment by abutting owners in the nature of a rental, for the permit to use ports of the waterways in the erection of wharves, docks or other structures; and that 75% of such rental shall be paid to the county 'for the use of said port district.' The Port has thus an independent financial interest in this controversy; and although the state has also an interest, suit *against* the Port would not be prevented by the 11th Amendment. What effect the judgment in this case will have upon the state's interest, we have no occasion to consider." (255 U. S. at 71).

The Port of Seattle case may thus be said to stand for the following concrete propositions: First, the state is not a necessary party to a suit brought by (or against)

a state agency for the purpose of quieting title to the state's land, providing such agency has also an independent financial interest in the controversy. Second, such independent financial interest may consist of a mere right in the agency to expend, in performing its state's functions, a certain part of a fund derived from the rental of the state land, which fund is not in the custody of the agency, but it is in the express custody and possession of another state agency, namely, a county.

Parke et al v. Carriere Consol. School Dist. 12 *Fed.* (2*d*) 37. (C. C. A. 5th.), was an action originally brought in the state court of Mississippi by citizens of Louisiana and Maryland against a consolidated school district organized under sections 3999-4006 "Hemmingway's Code of Mississippi, represented and acting therein through its trustees. The case was removed to the U. S. District Court on the ground of diversity of citizenship. It was claimed by the defendant that the Federal Court had no jurisdiction, inasmuch as the school district was identical with the state and that the state cannot be a citizen within the meaning of the removal act.

The case should be read in connection with Nabors v. Holly Bluff Consolidated School Dist., 135 Miss. 608; 100 So. 177 and Ayres v. Agricultural High School, 98 So. 847, in which the Supreme Court of Mississippi held that authority to sue such school districts was not given by statute either expressly or by implication and that in the absence of such authority, no suit could be brought against a governmental agency: "A consolidated school district • • • is a governmental sub-division and agency exercising governmental functions. Neither the state nor any of its governmental sub-divisions exercising such functions is subject to suit unless expressly or by necessary implication it is so provided by statute. Those dealing

with the state or any of its governmental agencies do so with the understanding that any rights they may have are not enforceable in the courts unless the law so authorizes" (*Nabors v. Holly Bluff Cons. School Dist.* 100 *So.* 177). "Only the Legislature can surrender this privilege of the sovereign state and its governmental subdivisions or agencies" (*Ayres v. Board of Trustees,* 98 *So. at* 850).

But the Circuit Court of Appeals held that, under the ruling of the Supreme Court of Mississipi, consolidated school districts could never-the-less sue in their own name, and being so authorized were endowed with citizenship. In upholding the Federal jurisdiction the Court said:

> "If a school district is authorized by the legislation creating it, as construed by the courts, to contract and sue in its own name, then it is a body corporate, or a quasi corporate body, and as such a citizen of the state under which it is organized, within the purview of the Removal Act. This is true, though it may also be protected from suit by statute or court decision. A mere bureau or department of a state government cannot sue in its own name, or be a plaintiff. *Conferring on a school district capacity to contract and sue in its own name, of itself, makes of it more than a mere governmental bureau. The authority to institute suits in its own name subjects it to the burdens of a suitor including those arising under the Removal Act.* Suits can be maintained only by legal entities—persons, corporations, or quasi corporations. *The legislation that is sufficient to empower a school district to sue in its own name makes of it a legal entity, and a citizen within the meaning of the Removal Act.* In this case the state of Mississippi is not a party plaintiff on the record.
>
> The plaintiff is the school district or the trustees. Although it be true that the state is to be the beneficiary of the recovery, this does not make it a party to the record, any more than the fact that a

recovery in a suit by a personal representative goes to the distributees of the intestate prevents the personal representative from being the party plaintiff to the record for removal purposes." (12 Fed. (2d) at 38).

It may be argued from the above quotation that the present action may not be brought because the Commission is a part or division of what is designated as the State Highway Department. But the term "department" has no binding significance. The Court will look to the nature of the body thus created and not to the name which is given it. And inherent in its being is the power to contract and to sue and be sued in its own name—powers inconsistent with the notion that it is the state itself.

There is a seeming confusion in respondent's brief in the use of the term "agency". It is assumed that because the Commission is an agency of the state, it necessarily acted as agent for the state in making the contract, the state acting as principal. But there is a wide difference between the liability of an agent who, within the scope of his authority, contracts in his principal's name, and a legal entity contracting in its own name in the performance of a function delegated to it. A mere agent does not purport to act for himself but for his principal; the law says that only his principal shall be liable. But a state agency, such as this, is required to contract in its own name; the law creating it, says that it shall be liable—may be sued—on its contracts. The state has delegated to it the power to contract and placed upon it the burden of responsibility of a contracting party.

The fact that the contract may be for a highway, title to which shall be in the state, does not make the Commission, the contracting party, any the less liable. The fact that the Commission has promised that the State, rather than the Commission, will pay the money earned, does not

make the Commission any the less liable for breach of its contract, if the money is not paid. The contract might have been for a state and county highway, part to be paid by the state and part to be paid by the county, yet it will not be contended that for breach of such a contract both state and county must sue or be sued.

In this connection we wish to point out that the fact that the *ultimate* interest in the contract and in the suit is in the state does not make the state the contracting party, or a party to the action. The state has divorced itself from its interest both in this contract and in the suit; it has delegated that interest to an entity which it has created for that purpose. To illustrate: in the case of *Sloan Shipyard Corporation v. U. S. Shipping Board Emergency Fleet Corporation*, 258 *U. S.* 548 (previously cited), the Emergency Fleet Corporation was undoubtedly an agency of the United States. It was created, as an adjunct of the U. S. Shipping Board, which was performing a governmental function for the U. S. Judgments against it, if paid, would ultimately be paid by the U. S. Yet the Fleet Corporation is required to shoulder the burden of its own contracts and stand in court to answer for them.

7-8. That the Commission has no funds or property out of which a judgment may be satisfied, *if such be the fact*, does not render the Commission any the less a party to the action. If there are no funds or property of the Commission which can be reached in satisfaction of a judgment it will be presumed that the Legislature, which authorized the Commission to be sued, will eventually supply it with funds to satisfy any judgments rendered against it.

Ward v. Board of Regents 138 *Fed.* 372;

Hopkins v. Clempson Agricultural College 221 *U. S.* 636;

Phoenix Lumber Co. v. Regents of the U. of Idaho 197 *Fed.* 425;

Board of Trustees of the University of Ill. v. Bruner 51 *N. E.* 687-688 (*Ill.* 1898).

The question as to how a judgment may be collected is not before the court on this jurisdictional question. *But if considered by the court it should be held that the Commission has or may have property and funds out of which a judgment may be satisfied.*

Ward v. Board of Regents of State Agricultural College 138 *Fed.* 372 was an action for damages against a state agency. Ward claimed damages for breach of his contract of employment with the Board of Regents of the State Agricultural College of Kansas and invoked the jurisdiction of the Federal Court on the ground of diverse citizenship. The case went off on general demurrer, but in considering the propriety of sustaining the demurrer the Circuit Court of Appeals of the Eighth Circuit says:

> "The action of the trial court is justified upon three grounds: (1) It is contended that because the board of regents is simply a governing body, without property or the power of taxation, and receives all its funds by legislative appropriation, it cannot be sued unless a fund has been placed in its hands to meet the claim on which the action is based, and that in the absence of such a fund the plaintiff's only legal redress is by petition to the State Legislature. * * * (Page 373.)
>
> "The first contention of defendant finds its complete answer in the statute. The board shall have full control of the agricultural college. It may enter into contracts not only for the employment of the faculty, but also for maintaining the institution and for erecting such buildings as may be necessary from time to time. It is expressly given the power to sue and be sued in respect of any of these matters. When a judgment is recovered against the board, it may lawfully apply to its discharge any funds in its hands not otherwise

specifically appropriated, and, in case no funds exist for the purpose, it will be presumed that the Legislature will discharge its duty by providing a fund to meet any liability of the board which is thus judicially established." (Page 374).

Hopkins v. Clempson Agricultural College (supra) has been already discussed. This Court, considering the force of the argument that the lack of property in a state agency exempts such agency from suit uses the following language:

> "Besides, we have no right to proceed on the theory that if, at the end of the litigation, the plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in pleas to the jurisdiction, afford no reason why the College should be granted immunity from suit when it is claimed that in violation of the constitution it has taken private property for its corporate purposes without compensation." (221 U. S. at 648).

In *Phoenix Lumber Co. v. Regents of the University of Ida.* (Supra) a similar question was considered by District Judge Dietrich, now a member of the Circuit Court of Appeals 9th Circuit. Action had been brough against the regents of the University of Idaho for recovery upon a contract. The Court uses the following language:

> "The objection is urged that, if a judgment is rendered against the defendant, it follows that the court may direct the seizure and sale of its property—that is, of the University—in order to satisfy the judgment, and that no such result could have been contemplated by the Legislature. The objection goes, not to the power of the Legislature to subject the defendant to the jurisdiction of the courts, but, in the absence of an express provision to that effect, the consideration is supposed to militate against the reasonableness of the view that the power of the defendant to be sued is implied.

It is not at this time necessary to decide in what manner a judgment could or should be enforced against the defendant, or whether the court could or would, for the purpose of executing its judgment, cause the property of the defendant to be seized and sold." (197 *Fed.* 425 *at* 428-29).

The Supreme Court of Illinois in the case of *Board of Trustees of the University of Ill. v. Bruner*, above cited, was considering an action brought against the Board of Trustees of the University for a balance due upon a contract. In upholding the suit the Court says:

"The legal points raised here are that the trial court erred in refusing to require the plaintiff to answer as to how much he received from the Chicago University, and in refusing to hold, as a proposition of law, that the defendant could not be sued, being a mere agency of the state. * * * The second assigned error is, in our opinion, wholly without merit. The charter of the university expressly provided that it may sue and be sued, plead and be impleaded. The provision is substantially that found in all the charters of charitable institutions of the state, boards of education, school directors, and other similar governmental agencies. It has never been doubted that these corporations could be sued, the same as individuals. We cannot, if we would, disregard the plain language of the statute. *The judgment here makes no provisions for the issuing of execution, and therefore the question whether the trust property of the institution may be sold to satisfy the judgment is not presented.* When the legislature has expressly so stated, we can see no reason why the disputes between corporations like this and others should not be adjusted in the legal tribunals. No rule of public policy prohibits it." (51 N. E. at 687-88).

We have discussed the above matter in the light of the opinion of the Circuit Court of Appeals. (Tr. p. 136). But in considering this opinion we wish to express our regret that

the statement was made that the Commission has no property out of which the judgment may be paid. To our mind such statement was not necessary to the decision of the case. So long as the object of the suit was merely to secure a judgment against the Commission, so long as the plaintiff did not seek to impress a lien upon or secure possession of state property or funds, it was immaterial whether the Commission has any property or not. The question before the Court was not whether the judgment could be collected, but whether the necessary effect of the judgment would be to deprive the state of property or funds which it owned. The statement of the Court, if held to be the law of the case, has in a sense foreclosed the plaintiff of its right to satisfy whatever judgment it may secure out of whatever property the Commission may have at its disposal.

We respectfully suggest that if this Court upholds the jurisdiction in this action it expressly state that the manner of collecting a judgment be left until occasion calls it forth, and that at that time the plaintiff be permitted to limit the question as to whether the Commission has funds or property that can be reached.

If the matter must be decided, or stand decided, may we also suggest that it is incorrect to say that the Commission has no property. The plain intendment of the statute is that the Commission may acquire property; it has the right to purchase property; it cannot perform highway construction and maintenance work without property. Whether such property can be reached by process is a question which must ultimately, but should not now, be considered.

Also we believe that the so-called State Highway Fund provided for in the statute is not, in strict sense, a state fund any more than in the sense that money in the pos-

session of a county treasurer, or the treasurer of a school district, or the secretary of a state prision board, is state money. In each of these cases the ultimate title to the money of course is in the state; it is placed in the possession of a state agency for the fulfillment of the purpose for which the agency was created. If a judgment is authorized against such agency, then truly one of the purposes for which the money is placed in charge of the state agency is to satisfy such judgment.

Now the State Highway Fund is a fund made up from many sources. It consists not only of money placed there by the state, but moneys which the counties may deposit with the State Treasurer for the construction of county highways, or moneys which are donated to the fund for the purpose of constructing highways, and of any other funds which may lawfully come into the hands of the treasurer for the purpose of supplying the fund. The fund is in reality an endowment to the State Highway Commission. It is not a part of the general fund of the state and does not revert, as other funds do, to the general fund. It can be paid out only upon vouchers issued by the State Highway Superintendent. A reading of the statute indicates that the State Highway Superintendent, appointed by the Commission, is the agent of the Commission to satisfy the contracts which the Commission makes and the obligations which it incurs. The fund may rightly be said to be a fund absolutely subject to the disposal of the Commission for all of its various purposes, state, county and municipal. It is seemingly admitted in petitioner's brief, through the citation of certain authorities therein contained, that if this fund had been placed in the custody of the Commission, the Commission would then have had property out of which the judgment could have been paid. But in just reason there is no distinction between placing the fund in the hands of the state treasurer to be expended

solely by the Commission for its various uses and purposes, and placing the fund directly in the hands of the Commission to be so expended. In either instance it is a fund of the Commission; in either instance the state has no discretion with respect to the expenditure of the fund and has no jurisdiction over it except in so far as a state always has jurisdiction through its legislature over a fund in the possession of one of its arms or agencies.

It is true that the state undoubtedly has an interest in this fund, but it has expressly consented, as we think, in consenting that a judgment may be secured against the Commission, that its interest is transferred to the uses and purposes of its agency. Also it has no greater interest in the fund than it would have if the Commission had the actual possession and custody of it. The case of *Butterfield v. State Industrial Accident Com.* 111 *Ore.* 149, 223 *Pac.* 941 correctly reasons the situation, as we believe, in the following language:

> "Nor does the fact that payments from the fund created by the act are to be made by the state treasurer on warrants drawn by the secretary of state render it constitutional. Both the secretary of state and the state treasurer are without discretion in regard to that fund. Payments from the fund can be made only upon vouchers transmitted by the Commission. Section 6638, Or. L., as amended by Laws 1921, c. 311. The state is a contributor to the fund, and is, therefore, interested in the fund in the same manner as it is in the fund of the State Board of Agriculture." (223 Pac. at 942.)

Our position then is that the State Highway Fund is a fund of the Commission in which the state, counties and municipalities, as well as those who may donate sums to it are interested, as well as the state; that the state treasurer is ex officio the treasurer of the Commission in the

matter of keeping and expending the funds is merely the machinery which the legislature has provided for its disposition by the Commission.

9. The decisions of the Supreme Court of Wyoming purporting to construe the statute creating the Commission are not binding on this court for the reason that the contract and rights accruing thereunder originate prior to such state decisions. *Burgess v. Seligman*, 107 *U. S.* 123-133; *Kuhn v. Fairmont Coal Co.* 215 *U. S.* 349-360; 25 *C. J.* 843.

It is claimed on pages 10 and following of petitioner's brief that the Supreme Court of Wyoming has construed the statute, under which the Commission derives its being, in the cases of Hjorth Royalty Co. v. Trustees of the University (30 Wyo. 309) and Frazen v. Southern Surety Co. (35 Wyo. 15). Under this construction it is claimed the Commission has been held to be the state itself. Such construction is held to be binding on this court. In both of these cases it will be noted that the Supreme Court of Wyoming made no attempt to place a construction upon the statute. The Hjorth Royalty Co. case was a suit to quiet title to land which was owned by the State of Wyoming and the real point in the case was that the state was the necessary party to a suit to quiet its title. In the Franzen case the question was whether a certain contract was between private individuals or between an individual and a public body, and the real holding was that the State Highway Commission was a public body although the court stated that it was "one of the departments of the state itself." The language referred to in respondent's brief, we believe, is clearly dictum and would not in any event be binding on this court under the authority of *Carroll v. Carroll*, 16 *Howard at* 286.

But aside from this and more important is the fact

that the contract out of which the present action arose, and the rights accuring under it, arose long prior to the decisions of the Supreme Court of Wyoming referred to. The contract was made on June 1, 1922. The Hjorth Royalty Company case was decided in 1925. The Franzen case was decided in 1927.

The rule as to the binding force on this court of decisions rendered in such manner is thus expressed:

> "So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt."

Burgess v. Seligman, 107 *U. S. at* 33 *and* 34.

While a decision of the Supreme Court of Wyoming, even after the contract had been formed and rights accrued under it, is entitled to respectful consideration, we feel that in the present instance, inasmuch as the precise point involved in the instant case was not before the Supreme Court of Wyoming and inasmuch as the Supreme Court of Wyoming made no pretense of analyzing the statute or even of citing the statute in its decision, the language used by it and quoted in respondent's brief is entitled to little weight.

10. On matters involving its jurisdiction the Federal Courts are not bound by decisions of a state court but will

exercise their independent jurisdiction. (See cases cited under subdivision 10 of the Summary of Argument).

We submit this point on the authorities cited without further comment. The Federal Court, by the demurrer, was called upon to pass on its own jurisdiction. It was not required to accept decisions of the state court on such jurisdictional matter. The question as to whether the State or the Commission was the real party to the action was the exact jurisdictional question in point.

11. Having established the Commission as a body in its nature suable the Legislature of Wyoming could not by its amendment to Sec. 3025 of the statute restrict jurisdiction to its own courts and thus abridge the jurisdiction of the Federal Court.

Chicot County v. Sherwood 148 *U. S.* 529;
Barrow Steamship Co. v. Kane, 170 *U. S.* 100.

In the latter case the court, considering an attempt of a state to confine suits against a suable party to its own courts, says:

> "The jurisdiction so conferred upon the national courts cannot be abridged or empowered by any statute of the state. Hyde v. Stone, 20 How. 170-175; Smith v. Ames, 169 U. S. 466. It has therefore been decided that a statute which required all actions against a county to be brought in the county court, does not prevent the Circuit Court of the United States from taking jurisdiction of such an action, Chief Justice Chase saying that 'no statute of limitation of suability can defeat a jurisdiction given by the Constitution.' "

12. Insofar as the state's interests are affected by this action and insofar as it is represented by the Commission the state waived its immunity by the Commission's volun-

tary appearance in the action by filling its general demurrer and its answer on the merits. *Clark v. Barnard* 108 *U. S.* 436; *St. Louis & S. F. Ry. Co., v. McBride* 141 *U. S.* 27. Having thus submitted to the jurisdiction the state could not revoke jurisdiction in the Federal Court, over which it had no control, by changing the statute. The state decisions with respect to the revocation of jurisdiction in state courts have no application, since the revocation of consent serves also to revoke jurisdiction in the state court.

The record shows that the Commission appeared in the action and in addition to filing its demurrer to the jurisdiction filed its general demurrer and thereafter filed its answer. It was appearing in the case and contesting the same on the merits at the time when the legislature of Wyoming amended the act restricting suits against the Commission to the state court. It continued to appear generally in the action long after the amendment to the statute had gone into effect both by its answer on file and by its general demurrer to plaintiff's reply. It cannot voluntarily appear in an action and contest the same on the merits and at the same time object to the jurisdiction of the state court. The case above cited under this division, we believe, are authority on this point.

Numerous decisions of state courts are cited in petitioner's brief to the effect that the state's consent to be sued can be revoked even after the commencement of action. But an action in a state court is commenced in a tribunal the jurisdiction of which is controlled by the state legislature. An act of the legislature after the commencement of such suit operates not merely to revoke the consent of the state to be sued, but also revokes the jurisdiction of a state court to hear it. This is not true of an action commenced in a federal court. The state legislature has no power to abridge the jurisdiction of the federal court.

The proposition suggested under this sub-division of our brief is really a matter of supererogation however, since, as seen under sub-division 11 hereof, the state by establishing a body suable in its nature and having a citizenship,, is powerless to confine suits against it to its own courts.

13. Federal cases cited in petitioner's brief holding that the state is a party to the action are cases in which the Eleventh Amendment was invoked and in which the direct object of the suit was to deprive the state of its property, affect its property interests or compel the performance of some political function by a state officer. These cases have no application to an action like the present, in which the object is merely to secure a judgment against a suable body and no attempt is made to charge the state with liability or to affect its interests, except as the state may be ultimately interested.

Some of the cases heretofore cited in this brief with respect to the right to sue a state agency have been cases in which the Eleventh Amendment was invoked and the rule governing its application has been discussed. They were cited to show that even where the Eleventh Amendment is invoked, suits against state agencies are not forbidden. But we do not wish to recede from our position that the rule underlying the application of the Eleventh Amendment, which is liberal with a view of protecting the state's immunity, is not the rule governing the question of citizenship, or the question of the necessary parties to the record, where, as here, the state, in so far as its interests are concerned or affected, has expressly consented that the suit may be brought.

The cases cited on page 24 and 25 of petitioner's brief were all cases in which the Eleventh Amendment was in-

volved. They were also cases in which the object of the suit was directly to deprive the state of its property, or compel some political action on the part of a state officer.

Hagood v. Southern, 117 U. S. 52 was a suit brought against state officers to compel specific performance of a state contract by compelling such officers to perform an obligation belonging to the state in its political capacity. The contract in the case was made by the state itself and the result of a judgment would have been to compel the performance by the state of its contract. If, in the instant case, the contract was made not by the state but by the Commission, as we contend, Hagood v. Southern has clearly no application.

Louisiana v. Jumel, 107 U. S. 711 was a case in which the plaintiff proceeded directly against the auditor of the State of Louisiana, its treasurer and its board of liquidation by application for a mandamus to require these officers to appropriate certain state funds on hand to the payment of the interest due on bonds theretofore issued by the state and held by the plaintiff, and further to proceed to collect taxes for the payment of such interest. The direct object of the action was to compel state officers to pay out state money. It was a suit directly against the state inasmuch as it was in effect a suit for state property.

Ex-party Ayres, 123 U. S. 1 was a suit by aliens to enjoin the Attorney General of Virginia from bringing any suit in the name of the state to enforce the collection of taxes, the contention being that the state, by contract with the plaintiff, agreed to accept the payment of taxes in satisfaction of an obligation to the state. The object of the suit was and the effect of the judgment would have been to compel a performance *by the state* of its contract.

Smith v. Reeves, 178 U. S. 436 was a suit against a state treasurer to compel the treasurer to pay out certain

state moneys. Here again the object of the suit was to get possession of a state property and the effect of a judgment would have been to compel the treasurer to pay out state money from the *general funds* of the state.

Murray v. Wilson Distilling Co., 213 U. S. 151; Lankford v. Platte Iron Wks. Co., 235 U. S. 461; in re State of N. Y., 256 U. S. 490; are all cases in which the necessary effect of a judgment would have been to *compel* the paying out of state funds, inasmuch as the court held that the funds forming the subject of the suit were in effect funds of the state.

Other decisions of the Supreme Court cited on page 25 of respondent's brief are of similar effect.

14. Decisions of state courts cited in the petitioner's brief are mainly distinguishable in their facts but illustrate the attitude of state courts in regarding over-jealously the state's sovereignty and its exemption from suits in its own courts.

State v. Field 27 N. M. 384; decided by a state jurisdiction, is of a piece with the federal decisions last mentioned. It was an application for a writ of mandamus to compel the Commissioner of Public Lands of New Mexico to convey certain public lands of the state, which the applicant had contracted to purchase from the state free from the state's reservation of mineral rights. The state had not contracted to convey the land free of its mineral rights, but had reserved these rights. It was held that if the state had contracted to convey its land without reservation, the defendant Commissioner might be compelled to issue an instrument of conveyance to the plaintiff, inasmuch as doing this would be a mere ministerial act subject to control by mandamus. But since the state had not so contracted, the action was in effect against the state, since the direct object of the suit was to secure the conveyance

of state property. The rule of the Eleventh Amendment is discussed and apparently followed as the rule governing the general question of the state's immunity from suit.

McDowell v. Fuller 169 Mich. 332, cited on page 325 of respondent's brief, was a suit against the warden of the Michigan State Reformatory for breach of a contract. The statute creating the State Reformatory provided that the warden might sue and be sued by "his name of office." Judgment was secured against the warden and after judgment and during appeal the authority to sue and be sued was repealed by the legislature. It was held that the action was against the state and that the consent to be sued might be revoked by the state, and that such consent automatically dismissed the appeal. In making this holding the rule underlying the application of the Eleventh Amendment of the Constitution of the United States was applied. This case is distinguishable from the present action for the reason that the authority was to sue the warden by his "name of office," that is, as an officer, or agent of the state; the use of the term "office" indicating that the warden was not a state agency but a state officer. Generally the case is distinguishable on the ground that the question considered was the state's immunity from suit, where consent had not been given to sue, and the state court laid down a self-protective rule for the preservation of the state's sovereignty.

U. S. v. McCallum 281 Fed. 834 cited on page 25 of respondent's brief is the same case in the lower court as McCallum v. U. S. 298 Fed. 373 (C. C. A. 9th). This was an action by the United States against the Board of State Harbor Commissioners of the State of California for violation of the Federal Safety Appliance Act in the operation of a state owned and operated railroad. It was held that the State Board was subject to the suit because the acts performed were unauthorized acts and wrongful, and that

question as to whether such judgment can be secured, except it may be said that in the absence of an express authority to be sued the fact that a legal entity operating as a state agency is given no funds or property tends to rebut the notion that it was the intention of the legislature that it should be subject to suit.

Curits Co. v. State Highway Commission, 91 N. J. Eq. 421, 111 Atl. 16 is cited on page 14 of respondent's brief as authority to the point that the State Highway Commission of Wyoming in the case at bar was a mere *alter ego* of the state. The only question involved in this case was whether the State Highway Commission of New Jersey was a "municipality." Under the title of the act creating the N. J. Highway Commission, which was held to govern the language of the act itself, it was decided that the term "other municipalities" applied only to municipalities like cities, towns and townships and not to those loose, or quasi coroprate bodies, like Commissions. (111 Atl. 16). General language in this case to the effect that the Commission was a mere alter ego of the state must be taken in connection with the precise point decided.

15. The Wyoming constitutional amendment did not create the Commission; it does not affect its purpose, or control its nature.

It is claimed that the nature of the Commission takes color from the provision of the constitutional amendment of Wyoming adopted in 1916 under which the legislature was empowered to provide for the construction and employment of public highways in whole or in part by the state. Attention is called to Section 6 and Section 9 of Article XVI of the Constitution of Wyoming appearing in the Appendix. A reading of these two articles shows that it was the intention of the constitutional provision adopted in 1916 that the state might thereafter engage in the construction and maintenance of public highways both di[illegible]

ly and indirectly. In creating the State Highway Commission the Legislature has chosen to provide for the construction of highways by the state indirectly; that is by creating a separate entity representing territorially defined districts of the state, representing the various counties of the state and to an extent representing municipal corporations of the state, as well as the state itself. The Commission represents the interests of all of these political sub-divisions of the state and not merely the interests of the state independently. Each sub-division, including the highway, or commissioner, districts, are recognized as having an interest in highway construction performed by the Commission. To be sure the contract in the present instance was a contract representing a state's interest, but the body making the contract was not the state itself but a body formed to represent all of these various interests, as they might arise. In exercising the power to engage directly or indirectly in highway construction the Legislature might have authorized the various Boards of County Commissioners to build highways through their respective counties under aid from the state. The Legislature might have created highway districts, controlled by commissions, vested with express corporate existence, having power to collect from their districts a part of the expenditure of building highways and the power to receive the other part from the state. The Legislature chose rather to create a body which would represent the interests of state, county, towns and districts and in doing this it has created an intervening entity sufficiently separted from itself to be recognized by the courts as a party in interest in a suit brought against it in its own name.

The fact that the Act of Congress furnishing federal aid to the states does not in express language provide for the giving of aid to an arm or agency of the state, does not alter the nature of the agency which the state has thus

created. To our perception there is nothing in the Federal Aid Act itself to prevent the furnishing of aid to the state through any agency which the state may designate representing not only the state but its various governmental subdivisions or arms of government.

CONCLUSION

In conclusion of the whole matter we submit that the judgment of the Circuit Court of Appeals should be affirmed and that the opinion of the Court in affirmance thereof should expressly state that the question as to whether there be property out of which the judgment which respondent seeks may be collected is a question not before the court on this jurisdictional matter; or, if before the court, that there is property which can be reached, as hereinbefore suggested.

Respectfully submitted,

JOHN W. LACEY,
HERBERT LACEY,
WILLIAM L. WALLS,
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Counsel for Respondent.

APPENDIX

"The district courts shall have original jurisdiction as follows:

(1) First. Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and * * * (b) is between citizens of different States and ~~Foreign States, citizens or subjects~~."

Judicial Code, Sec. 24, *Subd.* 1; *U. S. Code, Sec.* 41, *Subd.* 1.

ARTICLE XI.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Eleventh Amendment to Constitution of United States.

"CHAPTER 186.

STATE HIGHWAY DEPARTMENT.

§3025. Commissioners — Appointment of — Qualification—Offices—Duties.

"There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years; provided, that upon the passage of this chapter, the governor shall appoint two commissioners for the term

of two years, two commissioners for the term of four years, and one commissioner for the term of six years. One commissioner shall be appointed from each of the following described districts: District No. 1, composed of the counties of Laramie, Albany, Platte and Goshen; District No. 2, composed of the counties of Carbon, Sweetwater, Uinta and Lincoln; District No. 3, composed of the counties of Niobrara, Converse, Natrona and Fremont; District No. 4, composed of the counties of Hot Springs, Washakie, Big Horn and Park; District No. 5, composed of the counties of Sheridan, Johnson, Campbell, Crook and Weston. If any commissioner shall cease to be a resident of the district from which he is appointed, his office shall be vacant; all vacancies from any cause shall be filled by appointment by the governor for the unexpired term. Each of said commissioners shall qualify by taking the constitutional oath of office and each shall receive a salary of six hundred dollars per year and his actual and necessary traveling expenses while away from his home in the performance of the duties of his office, to be paid from the state highway fund hereinafter provided. The commission shall maintain offices in the state capital, which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the 'State Highway Commission of Wyoming,' and may be sued by such name in any court upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all action and appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words 'State Highway Commission of Wyoming, Official Seal,' and all copies of all records and other instruments in the office of the commission, certified under the hand of its secretary with said seal affixed, shall be received in any court as *prima*

facie evidence of the original record or instrument." (L. 1919, c. 132 §1.)

§Sec. 3026. State Highway Superintendent. The commission shall appoint a state highway superintendent, with a salary to be fixed by the commission, payable in equal monthly installments. He shall be experienced and skilled in highway and bridge construction and maintenances; shall be allowed his actual and necessary traveling and other expenses incurred in the discharge of his official duties, and shall give his entire time to the duties of his office. Before entering upon the duties of his office he shall take the constitutional oath of office and give bond to the state of Wyoming in such amount and with such surety as may be approved by the commission, conditioned upon the faithful discharge of his duties and his accounting for all property, material and records in his control. Under the supervision of the commissioner he shall have complete charge of laying out and establishing highways upon which any portion of the state highway fund is to be expended, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of Congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or partially within the national forests, and with the approval of the commission shall purchase all materials, supplies and equipment, including road-building machinery, materials, supplies and equipment, and shall employ such engineers, superintendents and employees with salaries to be approved by the commission, as may be necessary for the proper performance of the duties of the commission and the construction work undertaken by it." (L. 1919, c. 132 §2.)

"§3027. Work in Charge of Highway Superintendent. All road and bridge construction work any part of the cost of which is paid from the state highway fund, shall be per-

formed in accordance with the plans and specifications prepared by the state highway superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the state highway superintendent shall have complete charge thereof, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of Congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or paritally within the national forests. All improvements costing more than two thousand dollars shall be constructed upon contracts awarded to the lowest responsible bidder after public notice, but the commission may reject any or all bids, and re-advertise for bids; and the improvements costing less than two thousand dollars may be constructed by the commission upon force account or upon contract awarded upon public notice, as the commission may determine. The commission shall adopt general rules regulating the publication of notice to bidders and the awarding of contracts." (L. 1919, c. 132, §3.)

"§3028. Designation of State Highways. It shall be the duty of the state highway commission from time to time to designate public highways to be known as state highways, which may coincide in whole or in part with county roads theretofore legally established, and whenever such state highway shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties, in so much of the road and right of way as shall be so designated shall pass to and vest in the state of Wyoming. With respect to so much of the rights of way of such state highways as shall not be acquired from the respective counties, the commission shall have the authority to acquire the same by purchase or gift, and if such necessary rights of

way cannot be so acquired, the commission shall have the authority to acquire the same by condemnation proceedings in the same manner as is provided by law for the condemnation of rights of way for railroad purposes, and upon the commencement of such condemnation proceedings shall have the authority to enter upon the proposed right of way and to commence the construction of the highway thereon; provided, that such condemnation proceedings may not after such entry be discontinued without the consent of the land owner." (L. 1919, c. 132, §4.)

"§3029. Work Shall Be Performed at Expense of State. Excepting as such work may be performed in co-operation with the secretary of agriculture of the United States as hereinafter provided, the construction and maintenance of all state highways, including all bridges and culverts thereon, shall be performed at the expense of the state and by and under the supervision of the commission and the state highway superintendent." L. 1919, c. 132, §5.)

"§3030. Co-operation With Counties. The commission shall have the power and authority to co-operate with the respective counties of the state in the construction of county roads, including bridges and culverts, other than state highways. All such co-operative work shall be performed under the immediate control and supervision of the commission and the state highway superintendent, and in accordance with plans and specifications prepared by the said superintendent, and shall not be commenced until the county shall have entered into an agreement with the commission to pay not less than one-half of the total cost to the state of such work and to pay the entire cost of maintaining the said highway thereafter." (L. 1919, c. 132, §6.)

"§3031. Contracts and Agreements with United States Government. The legislature of the state of Wyo-

ming hereby assents to the provisions of the act of Congress approved July 11, 1916, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' together with all acts and legislation amendatory thereto, or supplementary thereto or which shall grant or authorize aid for the construction, improvement, maintenance or repair of public roads or highways. The state highway commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of roads under the provisions of the said act or acts of Congress to submit such scheme or program or construction or maintenance as may be required by the secretary of agriculture and to do all other things necessary fully to carry out the co-operation contemplated and provided for by the said act or acts, for the construction or improvement of highways under the said act, the good faith of the state is hereby pledged to make available funds sufficient to equal the sums apportioned to the state by or under the United States government during each of the years for which federal funds are appropriated by section 3 of said act and to maintain the roads so constructed with the aid of funds appropriated and to make adequate provisions for carrying out such maintenance. Co-operative agreements under the provisions of said act shall be entered into with the secretary of agriculture only by the commission, but may be for the construction or improvement of either a state highway or a county road. If the road to be improved under such co-operative agreement is a state highway, the state's share of the expense shall be borne entirely by the state; if the highway to be so improved or constructed under such co-operative agreement is not a state highway, the state's share of the cost of such work shall be divided between the state and the county upon such basis as the commission shall determine, and before such agreement is entered into

with the secretary of agriculture the county must furnish the right of way and shall have entered into an agreement with the commission whereby it shall agree to pay its share of such cost and to pay the cost of all subsequent maintenance work which shall be performed by and under the supervision of the state highway superintendent, and the county also shall pay into the state highway fund its share of the estimated cost of such construction." (L. 1919, c. 132, §7.)

"§3032. Plans and Specifications of Roads and Bridges. It shall be the duty of the state highway superintendent to compile all available information relative to the public roads and bridges within the state and for this purpose he may require the board of county commissioners of any county to cause to be prepared comprehensive maps to be filed in the department; he shall prepare standard plans and specifications for the construction of roads, culverts and bridges, and compile data relative to road and bridge materials and their values, and for this purpose may call upon the department of civil and irrigation engineering of the state university to make test of road and bridge materials without charge; and he shall furnish such plans, specifications and data to any board of county commissioners upon request, and shall advise with such boards with respect to highway construction and improvements not within the jurisdiction of the department and shall prepare special plans and specifications for such work when requested. He shall prepare plans and specifications for all bridges to be constructed by any county, city or town within the state, the cost of which shall exceed one thousand dollars, and no contract for the construction of such bridge shall be valid unless the plans and specifications therefor have been prepared or approved and the contract approved by the state highway superintendent and no payment upon any such contract shall be made until such

bridge shall have been examined and the payment approved by the said superintendent or his assistant." (L. 1919, c. 132, §8.)

"§3033. Annual Report. The state highway superintendent shall make an annual report to the commission of the transactions of the department, and on or before December first of each even numbered year, the commission shall make a report to the governor, and may cause the same to be printed, the cost to be paid from the state highway fund." (L. 1919, c. 132, §9.)

"§3034. State Highway Fund. There is hereby created a fund to be known as the state highway fund, to the credit of which the state treasurer, who is hereby designated as the state official to receive all amounts paid by the United States under the said act of Congress approved July 11, 1916, shall place all moneys heretofore received for said fund, all money hereafter received from the United States, under co-operate agreements as hereinbefore authorized, all money derived from taxes levied for such purpose or appropriated for said fund, all moneys received from the sale of state bonds for highway construction or improvement, all money received from the counties under co-operative agreements as hereinbefore authorized, and all other moneys received from donations or bequests which may be accepted by the commission on behalf of the state of Wyoming, or from any other source designated by law for that purpose. All moneys in said fund shall be available for the purposes of this chapter without further appropriation and no warrant shall be drawn thereon excepting on voucher approved by the state highway superintendent. It is hereby provided that seventy-five per cent of the amount of any bond issue hereafter issued by the state of Wyoming for the construction or improvement of state highways, after the payment of overhead expense, shall be apportioned to and spent in each county in the

proportion which the assessed valuation of each county by the last general assessment bears to the total assessment of the state." (L. 1919, c. 132, §10.)

"§3035. Appropriation. There is hereby appropriated to the state highway fund in the state treasury not otherwise appropriated, the sum of three hundred thousand dollars, which shall be made available upon the passage of this chapter, and the additional sum of three hundred thousand dollars which shall be available on March first, 1920. Balances remaining in said fund at the close of any annual or biennial period shall not revert to the general fund, but shall remain in the state highway fund and be subject to subsequent expenditure under this chapter. It is hereby provided that 75 per cent of the amount appropriated by the provisions of this chapter, after the payment of overhead expenses, shall be apportioned to and spent in each commissioner district in proportion to the assessed valuation of each district by the last general assessment." (L. 1919, c. 132, §11.)

"§3036. Shall Not Affect Contract in Existence. This chapter shall not affect any contract for the construction or improvement of highways now in existence or that may be made by any county prior to June 1, 1919." (L. 1919, c. 132, §12.)

"§3037. Overhead Expense. It is hereby provided that all expenses of the maintenances of office, offices, salary, salaries, engineering, surveying, field supervision and other overhead expenses in connection with the administration of this chapter, shall not exceed fifteen per cent of the total amount expended each year under the provisions of this chapter." (L. 1919, c. 132, §13.)

Wyo. Comp. Stat. 1920, *Chap.* 180.

"§154. General Duties. The attorney general shall

prosecute and defend all suits that may be instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law, and he shall represent the state in all criminal cases in the supreme court, and shall defend all suits brought against the state officers in their official relations, except suits brought against them by the state. He shall be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in either the supreme court of the state, or in any of the United States courts. He shall be the legal adivisor of all elective and appointive state officers, and of the prosecuting attorneys of the several counties of the state, and shall, when requested, give written opinions upon questions submitted to him by such officers, and by either branch of the legislature, when in session."

Wyoming Compiled Statutes 1920, *Sec.* 154.

"§4893. Condemnation proceedings. The state, the counties and each municipal corporation shall have the power to purchase or acquire by condemnation, any real estate, including streets, alleys, or public highways, as sites for public buildings, or for any other necessary public purpose, and to take therein the fee simple absolute, which power of condemnation shall be exercised in the manner prescribed by law for the condemnation of real estate by railroad corporations. Proceedings in condemnation as aforesaid shall be conducted in the name of the state, county or municipal corporation, as the case may be, and by the attorney general, when for the state; the county attorney when for the county, and the municipal attorney, when for a municipal corporation. (L. 1890, c. 64; R. S. 1899, §2913; C. S. 1910, §3829.)"

Wyoming Compiled Statutes 1920, *Sec.* 4893.

"Sec. 6. Donations prohibited. Neither the state nor any county, city, township, town, school district, or any other political sub-division, shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation. The state shall not engage in any work of internal improvements unless authorized by a two-thirds vote of the people."

Const. Wyo. Art. XVI, *Sec.* 6.

"Sec. 9. State Highway construction. The provision of Sec. 6 of Article 16 of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties; and, notwithstanding said inhibition as to works of internal improvement, whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in the aid of their completion."

Const. Wyo., Art. XVI, *Sec.* 9.

SUPREME COURT OF THE UNITED STATES.

No. 96.—October Term, 1928.

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, et al., Petitioner, *vs.* Utah Construction Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 2, 1928.]

Mr. Justice McReynolds delivered the opinion of the Court.

Prior to 1916 the State of Wyoming could not engage in works of internal improvement unless specially authorized by popular vote. During that year the following section was added to Article XVI of her Constitution:

> "Sec. 9. State highway construction. The provision of Section 6 of Article XVI of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties."

In 1919 the Legislature passed the State Highway Act, Session Laws 1919, Ch. 132, which directed:

That there shall be a Highway Department consisting of a Commission of five members, and a superintendent. The "Commission shall have the power to sue in the name of the State Highway Commission of Wyoming, and may be sued by such name in any court upon any contract executed by it." All roads, the cost of which is paid from the State Highway Fund, shall be constructed in accordance with plans and specifications prepared by the Highway Superintendent and shall be performed by or under contracts ap-

proved and awarded by the Commission. Except as otherwise specified "construction and maintenance of all State Highways, including bridges and culverts thereon, shall be performed at the expense of the State and by and under the supervision of the commission and State Highway Superintendent." "A State Highway Fund is created, to be in the custody and keeping of the State Treasurer," and payments therefrom shall be on warrants based upon vouchers by the Highway Superintendent.

The original act was amended in 1927 so as to provide—"The commission shall have the power to sue in the name of 'The State Highway Commission of Wyoming' and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it."

By a contract dated June 1st, 1922, "between the State of Wyoming, acting through the State Highway Commission, and Utah Construction Company, a corporation, of Ogden, in the state of Utah, hereinafter called the Contractor," the parties undertook:—That the contractor, at his own cost should do all work and furnish all labor, materials, and tools, "except such as are mentioned in the specifications to be furnished by the State of Wyoming," and construct a designated highway. "The State of Wyoming shall pay and the Contractor shall receive and accept as full compensation for everything furnished and done by the Contractor under this contract and also for all loss or damage arising out of the nature of the work, the action of the elements or from any unforseen contingencies or difficulties encountered in the prosecution of the work, the prices stipulated in the proposal." "Time shall be of the essence of this contract," and for failure to complete the work as agreed "damage will be sustained by the State of Wyoming . . .; and it is therefore agreed that said Contractor shall pay to the State of Wyoming, as liquidated damages and not as penalty, an amount equal to the cost of maintaining the necessary force of engineers and inspectors on the work during the additional time . . .; and the State Highway Commission may deduct the same from the amount due or to become due to the Contractor . . ." "The State of Wyoming hereby reserves the right to accept and make use of any portion of said work before the completion of the entire work without invalidating the contract, or binding itself to accept the remainder

of the work or any portion thereof whether completed or not." The writing concluded thus—"In witness whereof the State of Wyoming, acting through its State Highway Commission, party of the first part, has caused these presents to be executed by its Superintendent and the seal thereof to be hereunto affixed." It was signed "State Highway Commission of Wyoming, by L. E. Laird, Superintendent"; and by the Utah Construction Company.

A supplemental agreement dated December, 1922, and signed "State Highway Commission of Wyoming, by L. E. Laird, Superintendent" and the Utah Construction Company, undertook to modify the contract of June 1st, 1922, in certain material respects.

By an amended petition, naming the Wyoming State Highway Commission and its individual members as defendants, filed in the United States District Court of Wyoming August 2, 1925, the Utah Construction Company sought to recover damages arising out of the breach of the above-described construction contract, as supplemented. Jurisdiction of the court was invoked under Sec. 24 of the Judicial Code (U. S. Code, Sec. 41) on the ground of diverse citizenship of the parties. The petition alleges that the plaintiff is a citizen of Utah; the Commission and its individual members are citizens of Wyoming; more than $3,000 is involved.

The District Court concluded that the suit, in effect, is one against the State; a state is not a citizen under the Judiciary Acts; there is no diversity of citizenship; and no jurisdiction.

The Circuit Court of Appeals thought that the proceeding is not really one against the State, and that the statute makes the Highway Commission a legal entity subject to suit. It accordingly reversed the District Court and directed that the cause be remanded.

It seem to us sufficiently clear that the suit is, in effect, against the State of Wyoming. The contract for the construction of the work in question was between the Utah Construction Company and the State. The State acting through the Highway Commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. Neither the Commission nor any of its members assumed any direct or personal responsibility. The supplemental agreement was not intended to impose liability where there was none before. Its purpose, considering the changed circumstances, was to modify in the ways

specified what the original parties had undertaken to do. The Commission was but the arm or *alter ego* of the State with no funds or ability to respond in damages. There is no claim that the members of the Commission are personally liable. *Hjorth Royalty Co.* v. *Trustees of University*, 30 Wyo. 309; *Franzen* v. *Southern Surety Co.*, 35 Wyo. 15; *Ex parte Ayers*, 123 U. S. 443, 502; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642; *Ex parte State of New York*, No. 1, 256 U. S. 490, 500.

It is unnecessary for us to consider the effect of the general grant of power to sue or be sued to the Highway Commission or its withdrawal in 1927—this suit, in effect, is against the State and must be so treated. No consent by the State to submit itself to suit could affect the question of diverse citizenship. "A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States." *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487. *Minnesota* v. *Northern Securities Co*, 194 U. S. 48, 63.

Here the petition showed no diversity of citizenship between the real parties in interest—the State and the Construction Company. No other ground of jurisdiction was asserted. Consequently there was no jurisdiction. The judgment of the Circuit Court of Appeals must be reversed; that of the District Court will be affirmed.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.